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ANNOTATED
RULES
OF NORTH CAROLINA

1985

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THE GENERAL STATUTES OF NORTH CAROLINA

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RULES

JAN 29 1986

Prepared under the Supervision of the Department of Justice
of the State of North Carolina

Annotated, under the Supervision of the Department of Justice,
by the Editorial Staff of the Publishers

Under the Direction of

A.D. KOWALSKY, S.C. WILLARD, W.L. JACKSON,
AND K.S. MAWYER

1985 Replacement Volume

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Preface

This is the 1985 edition of the Annotated Rules of North Carolina. It contains rules and amendments thereto received by the publisher through December 5, 1985.

The volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

Lacy H. Thornburg,
Attorney General

December 5, 1985

Scope of Volume

Statutes:

Federal statutes relating to authentication of records and removal of causes.

Rules:

- General Rules of Practice for the Superior and District Courts
- Order Concerning Electronic Media and Still Photography Coverage of Public Judicial Proceedings
- North Carolina Rules of Appellate Procedure
- Rules of the Judicial Standards Commission
- Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission
- Code of Judicial Conduct
- Rules, Regulations and Organization of the North Carolina State Bar
  - Appendix A. Procedures for Ruling on Questions of Legal Ethics
  - Appendix B. Procedures for the Committee on Grievances
  - Appendix C. Procedures for the Committee on Unauthorized Practice
  - Appendix D. Procedures for the Committee on Legal Aid to Indigents and Referrals
  - Appendix E. Rules Governing Practical Training of Law Students
  - Appendix F. Regulations for Professional Corporations Practicing Law
  - Appendix G. Plan for Disposition of Funds Received from Interest on Trust Accounts
  - Appendix H. Plan of Certified Legal Specialization
  - Appendix I. Rules of Procedure Client Security Fund of North Carolina State Bar
- Order Establishing Client Security Fund
- Rules Governing Admission to Practice of Law
- Rules of Professional Conduct of the North Carolina State Bar
- Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases
- North Carolina Supreme Court Library Rules
- Local Rules of the United States Court of Appeals for the Fourth Circuit
- Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit
- Fourth Circuit Judicial Council Rules for Handling Complaints of Judicial Misconduct or Disability
- Rules of the United States District Court for the Eastern District of North Carolina
- Rules of the United States Bankruptcy Court for the Eastern District of North Carolina
- Rules of the United States District Court for the Middle District of North Carolina
- Rules of the United States Bankruptcy Court for the Middle District of North Carolina
- Rules of the United States District Court for the Western District of North Carolina
- Rules of the United States Bankruptcy Court for the Western District of North Carolina
- Rules Governing Section 2254 Cases in the United States District Courts
- Rules Governing Section 2255 Proceedings for the United States District Courts
- Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates

Annotations:

Sources of annotations to the rules of practice in all courts:

- North Carolina Reports through Volume 314, p. 121.
- North Carolina Court of Appeals Reports through Volume 75, p. 662.
- South Eastern Reporter 2nd Series through Volume 334, p. 299.
- Federal Reporter 2nd Series through Volume 772, p. 918.
- Bankruptcy Reports through Volume 52, p. 80.
- Federal Supplement through Volume 615, p. 609.
- Federal Rules Decisions through Volume 106, p. 597.
- Supreme Court Reporter through Volume 105, p. 3352.
- North Carolina Law Review through Volume 63, p. 1344.
- Wake Forest Law Review through Volume 20, p. 792.
- Campbell Law Review through Volume 7, p. 298.
- Duke Law Journal through 1983, p. 1142.
- North Carolina Central Law Journal through Volume 14, p. 680.
- Opinions of the Attorney General.

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GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Adopted Pursuant to G.S. 7A-34
Effective July 1, 1970

Index follows these rules.

Rule
1. Philosophy of General Rules of Practice.
2. Calendaring of Civil Cases.
3. Continuances.
4. Enlargement of Time.
5. Form of Pleadings.
6. Motions in Civil Actions.
7. Pre-Trial Procedure.
8. Discovery.
9. Opening Statements.
10. Opening and Concluding Arguments.
11. Examination of Witnesses.
12. Courtroom Decorum.
13. Presence of Counsel During Jury Deliberation.

Rule
14. Custody and Disposition of Evidence at Trial.
15. Photographs and Reproduction of Court Proceedings.
16. Withdrawal of Appearance.
17. Entries on Records.
18. Custody of Appellate Reports.
19. Recordari; Supersedeas; Certiorari.
20. Sureties.
21. Jury Instruction Conference.
22. Local Court Rules.

1. Philosophy of General Rules of Practice.

These rules are applicable in the Superior and District Court Divisions of the General Court of Justice. They shall at all times be construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them.

CASE NOTES

Applied in Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983).

2. Calendaring of Civil Cases.

Subject to the provisions of Rule 40(a), Rules of Civil Procedure and G.S. 7A-146:

(a) The Senior Resident Judge and Chief District Judge in each Judicial District shall be responsible for the calendaring of all civil cases and motions for trial or hearing in their respective jurisdictions. A case management plan for the calendaring of civil cases must be developed by the Senior Resident Judge and the Chief District Court Judge. The Administrative Office of the Courts shall be available to provide assistance to judges in developing a case management program.

The plan must be promulgated in writing and copies of the plan must be distributed to all attorneys of record.

In districts with Trial Court Administrators, the responsibility for carrying out the case management plan may be delegated to the Trial Court Administrator.

The case management plan must contain a provision that attorneys may request that cases may be placed on the calendar.

(b) The civil calendar shall be prepared under the supervision of the Senior Resident Judge or Chief District Court Judge. Calendars must be published and distributed by the Clerk of Court to each attorney of record (or party where there is no attorney of record) and presiding judge no later than four weeks prior to the first day of court.

(c) Except in districts served by a Trial Court Administrator, a ready calendar shall be maintained by the Clerk of Court for the District and Superior Courts. Five months after a complaint is filed, the Clerk shall place that case on a ready calendar, unless the time is extended by written order of the Senior Resident Judge or the Chief District Judge for their respective jurisdictions. In districts with Trial Court Administrators, a case tracking system shall be maintained.

(d) During the first full week in January and first full week following the 4th of July or such other weeks as the Senior Resident Judge shall designate that are agreeable to the Chief Justice, the Senior Resident Judge of each district shall be assigned to his home district for administrative purposes. During such administrative terms, the Senior Resident Judge shall be responsible for reviewing all cases on the ready calendar, or all cases designated by the Trial Court Administrator, of each county in the judicial district. The Senior Resident Judge shall take appropriate actions to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion. The Chief District Court Judge shall undertake periodically such an administrative review of the District Court Civil Docket.

(e) When an attorney is notified to appear for the setting of a calendar, pretrial conference, hearing of a motion or for trial, he must, consistent with ethical requirements, appear or have a partner, associate or another attorney familiar with the case present. Unless an attorney has been excused in advance by the judge before whom the matter is scheduled and has given prior notice to his opponent, a case will not be continued.

(f) Requests for a peremptory setting for cases involving persons who must travel long distances or numerous expert witnesses or other extraordinary reasons for such a request must be made to the Senior Resident Judge or Chief District Judge. In districts with Trial Court Administrators, requests should be made to the Trial Court Administrator. A peremptory setting shall be granted only for good and compelling reasons. A Senior Resident Judge or Chief District Judge may set a case peremptorily on his own motion.

(g) When a case on a published calendar (tentative or final) is settled, all attorneys of record must notify the Trial Court Administrator (Clerk of Court in those counties with no Trial Court Administrator) within twenty-four (24) hours of the settlement and advise who will prepare and present judgment, *and when.* (Amended July 1, 1980.)

CASE NOTES

Notice to Party Not Represented By Counsel. — Although rule formerly specified that the calendar be sent to each attorney of record and that the copy of the certificate of readiness be sent to opposing counsel, it was implicit in the rule that where a party is not represented by counsel he is entitled to the same notice. Laroque v. Laroque, 46 N.C. App. 578, 265 S.E.2d 444, cert. denied, 300 N.C. 558, 270 S.E.2d 109 (1980).

Applied in Callaway v. Freeman, 71 N.C. App. 451, 322 S.E.2d 432 (1984).

Cited in Green v. Eure, 18 N.C. App. 671, 197 S.E.2d 599 (1973); Simmons v. Tuttle, 70

N.C. App. 101, 318 S.E.2d 847 (1984); in Simmons v. Tuttle, 70 N.C. App. 101, 318 S.E.2d 847 (1984).

3. Continuances.

An application for a continuance shall be made to the presiding judge of the court in which the case is calendared.

When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court.

At mixed sessions, criminal cases in which the defendant is in jail shall have absolute priority. (Amended February 13, 1973.)

CASE NOTES

The granting of a continuance is within the discretion of the trial court, and its exercise will not be reviewed in the absence of manifest abuse of discretion. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

Where a motion for continuance is based on a right guaranteed by the Constitution, the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Error and Prejudice Must Be Shown. — A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Attorneys, under the guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

Applied in Lee v. Jenkins, 57 N.C. App. 522, 291 S.E.2d 797 (1982); Butler Serv. Co. v. Butler Serv. Group, Inc., 66 N.C. App. 132, 310 S.E.2d 406 (1984).

4. Enlargement of Time.

The judge or clerk of the court in which the action is pending may by order extend the time for filing answer.

When counsel, by consent under Rule 6 (b), agree upon an enlargement of time, the agreement shall be reduced to writing and filed with the clerk.

5. Form of Pleadings.

If feasible, each paper presented to the court for filing shall be flat and unfolded, without manuscript cover, and firmly bound. All papers presented to the court for filing shall be letter size (8 1/2″ x 11″), with the exception of wills and exhibits. The Clerk of Superior Court shall require a party to refile any paper which does not conform to this size. This rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted. (Amended July 1, 1982.)

6. Motions in Civil Actions.

All motions, written or oral, shall state the rule number or numbers under which the movant is proceeding. (See Rule 7 of Rules of Civil Procedure.)

Motions may be heard and determined either at the pre-trial conference or on motion calendar as directed by the presiding judge.

Every motion shall be signed by at least one attorney of record in his individual name. He shall state his office address and telephone number immediately following his signature. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief, there are good grounds to support it; and that the motion is not interposed for delay. (See Rule 7 (b) (2); also Rule 11.)

The court in civil matters, on its motion or upon motion by a party, may in its discretion order that argument of any motion be accomplished by means of a telephone conference without requiring counsel to appear in court in person. Upon motion of any party, the court may order such argument to be recorded in such manner as the court shall direct. The court may direct which party shall pay the costs of the telephone calls. Conduct of counsel during such arguments may be subject to punishment as for direct criminal contempt of court. (Amended January 1, 1985.)

CASE NOTES

Rule Number Necessary. — The trial judge should decline to rule upon motions which did not contain the rule number under which the movant is proceeding. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

Except When Defense of Insufficiency of Service of Process Asserted in Responsive Pleading. — Although worded as a motion, the defense of insufficiency of service of process was asserted in defendant's responsive pleading; therefore, the rule requiring that a movant state the rule number under which he is proceeding was inapplicable, and failure of defendant to so state did not constitute waiver of his defense of invalid service of process. Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

A motion which did not comply with the first paragraph of this rule was not totally defective since the directive of this rule of practice has the salutory purpose of ensuring that the court and the parties are aware of the grounds upon which the movant is relying, the court's order in the case indicated that the judge was fully aware of the basis for the motion. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

In a child custody proceeding where the defendant filed a motion for modification of a child visitation order, the plaintiff was not prejudiced by failure of the defendant to state the number of the rule under which he was proceeding as required by this rule since the written motion fully informed the plaintiff of the relief he was seeking and his reasons therefor. Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

Where there is an awareness by the trial judge of the grounds, the motion is adequately stated for the purposes of this rule. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Applied in Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971); Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973); Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Sherman v. Myers, 29 N.C. App. 29, 222 S.E.2d 749 (1976).

Stated in Don's Plumbing Co. v. Union Supply Co., 11 N.C. App. 662, 182 S.E.2d 219 (1971); Mull v. Mull, 13 N.C. App. 154, 185 S.E.2d 14 (1971); Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972).

Cited in Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972); Hoglen v. James, 38 N.C. App. 728, 248 S.E.2d 901 (1978); Whitfield v. Wakefield, 51 N.C. App. 124, 275 S.E.2d 263 (1981); Nickels v. Nickels, 51 N.C. App. 690, 277 S.E.2d 577 (1981).

7. Pre-Trial Procedure. (See Rule 16)

There shall be a pre-trial conference in every civil case, unless counsel for all parties stipulate in writing to the contrary and the court approves the stipulation. Upon its own motion or upon request of any party, the court may dispense with or limit the scope of the pre-trial conference or order.

In uncontested divorce, default, and magistrate cases and magistrate appeals, a pre-trial conference or order is not required.

A party who has not requested a pre-trial conference may not move for a continuance on the ground that it has not been held.

At least twenty-one days prior to trial date, the plaintiff's attorney shall arrange a pre-trial conference with the defendant's attorney to be held not later than seven days before trial date. At such conference a pre-trial order shall be prepared and signed by the attorneys.

If, after due diligence, plaintiff's attorney cannot arrange a conference with defendant's attorney, he may apply to the presiding judge or other judge holding court in the district (or district court judge with respect to district court cases) who shall make an appropriate order. The defense attorney may initiate pre-trial under the same rules applicable to plaintiff's attorney.

The pre-trial order shall be in substance as shown on the attached sample form.

8. Discovery.

All desired discovery shall be completed within 120 days of the date of the last required pleading. For good cause shown, a judge having jurisdiction may enlarge the period of discovery.

Counsel are required to begin promptly such discovery proceedings as should be utilized in each case, and are authorized to begin even before the pleadings are completed. Counsel are not permitted to wait until the pre-trial conference is imminent to initiate discovery.

Cross References. — As to sequence and timing of discovery, see § 1A-1, Rule 26(d).

CASE NOTES

Applied in Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980).

Stated in Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983).

Cited in Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978).

9. Opening Statements.

At any time before the presentation of evidence counsel for each party may make an opening statement setting forth the grounds for his claim or defense.

The parties may elect to waive opening statements.

Opening statements shall be subject to such time and scope limitations as may be imposed by the court.

CASE NOTES

Defendant May Not Make Opening Statement Personally. — The defendant, while retaining the services of his court-appointed counsel was not entitled to make an opening statement in propria persona. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

Quoted in Keene v. Wake County Hosp. Systems, — N.C. App. —, 328 S.E.2d 883 (1985).

Cited in State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980).

10. Opening and Concluding Arguments.

In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

In a criminal case, where there are multiple defendants, if any defendant introduces evidence the closing argument shall belong to the solicitor.

In a civil case, where there are multiple defendants, if any defendant introduces evidence, the closing argument shall belong to the plaintiff, unless the trial judge shall order otherwise.

Legal Periodicals. — For survey of 1982 law on evidence, see 61 N.C.L. Rev. 1126 (1983).

CASE NOTES

Trial Judge Controls Sequence of Argument. — The time and sequence of argument of a case to the jury is controlled by the trial judge under the authority of this rule. State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69, appeal dismissed, 279 N.C. 727, 185 S.E.2d 704 (1971), cert. denied, 407 U.S. 922, 92 S. Ct. 2467, 32 L. Ed. 2d 807 (1972); State v. Parker, 66 N.C. App. 293, 311 S.E.2d 321 (1984).

And He May Rule at Close of Evidence. — The trial judge is not required to rule upon the sequence of the argument prior to the closing of the evidence. State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69, appeal dismissed, 279 N.C. 727, 185 S.E.2d 704 (1971), cert. denied, 407 U.S. 922, 92 S. Ct. 2467, 32 L. Ed. 2d 807 (1972).

When there are several defendants and one of them elects to offer evidence, the right to open and conclude the arguments belongs to the State. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defendant's contention that consolidation of cases resulted in prejudicial error to him because he was deprived of his right to open and close the jury arguments when his codefendant elected to testify is without merit. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

The trial court properly allowed the State to close the argument where defendant called a witness and examined him but did not glean helpful information from the witness because the witness refused to incriminate himself. State v. Curtis, 18 N.C. App. 116, 196 S.E.2d 278 (1973).

Proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness. If the party shows it to a witness to refresh his recollection, it has not been offered into evidence. State v. Hall, 57 N.C. App. 561, 291 S.E.2d 812 (1982).

The trial court did not err by granting defendant the right to open and close the final jury arguments where defendant offered no evidence of his own, but was called to testify by plaintiff as an adverse witness. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

Applied in State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980).

Quoted in State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Baker, 34 N.C. App. 434, 238 S.E.2d 648 (1977).

Cited in Durham v. Quincy Mut. Fire Ins. Co., 311 N.C. 361, 317 S.E.2d 372 (1984).

11. Examination of Witnesses.

When several counsel are employed by the same party, the examination or cross-examination of each witness for such party shall be conducted by one counsel, but the counsel may change with each successive witness or, with leave of the court, in a prolonged examination of a single witness.

CASE NOTES

Discretion of Trial Judge as to Change of Counsel. — This rule clearly leaves it to the discretion of the trial court to permit a change of counsel if a lengthy examination is imminent. State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668, cert. denied, 284 N.C. 426, 200 S.E.2d 662 (1973).

12. Courtroom Decorum.

Except for some unusual reason connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

Counsel are at all times to conduct themselves with dignity and propriety. All statements and communications to the court other than objections and exceptions shall be clearly and audibly made from a standing position behind the counsel table. Counsel shall not approach the bench except upon the permission or request of the court.

The examination of witnesses and jurors shall be conducted from a sitting position behind the counsel table except as otherwise permitted by the court [see S. vs. Bass, 5 N.C. App. 431 (1969)]. Counsel shall not approach the witness except for the purpose of presenting, inquiring about, or examining the witness with respect to an exhibit, document, or diagram.

Any directions or instructions to the court reporter are to be made in open court by the presiding judge only, and not by an attorney.

Business attire shall be appropriate dress for counsel while in the courtroom.

All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided.

Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited.

The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness. Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority; nor shall he offer evidence which he knows to be inadmissible. In an argument addressed to the court, remarks or statements should not be interjected to influence the jury or spectators. (See Rule 22, Canons of Ethics and Rules of Professional Conduct, N.C. State Bar, G.S. 4A p. 273.)

Suggestions of counsel looking to the comfort or convenience of jurors should be made to the court out of the jury's hearing. Before, and during trial, a lawyer should attempt to avoid communicating with jurors, even as to matters foreign to the cause.

Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court. (See Rule 1, Canons of Ethics and Rules of Professional Conduct, N.C. State Bar, G.S. 4A p. 269.)

Editor's Note. — The Canons of Ethics and Rules of Professional Conduct, referred to above, are now found in this Rules Volume.

Legal Periodicals. — For article discussing the mechanics of objecting, see 4 Campbell L. Rev. 339 (1982).

CASE NOTES

Applied in State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982).

13. Presence of Counsel During Jury Deliberation.

The right to be present during the trial of civil cases shall be deemed to be waived by a party or his counsel by voluntary absence from the courtroom at a time when it is known that proceedings are being conducted, or are about to be conducted. In such event the proceedings, including the giving of additional instructions to the jury after they have once retired, or receiving the verdict, may go forward without waiting for the arrival or return of counsel or a party.

After the jury has retired to deliberate upon a verdict in a criminal case, at least one attorney representing the defendant shall remain in the immediate area of the courtroom so as to be available at all times during the deliberation of the jury and when the verdict is received.

14. Custody and Disposition of Evidence at Trial.

Once any item of evidence has been introduced, the clerk (not the court reporter) is the official custodian thereof and is responsible for its safekeeping and availability for use as needed at all adjourned sessions of the court and for appeal.

After being marked for identification, all exhibits offered or admitted in evidence in any cause shall be placed in the custody of the clerk, unless otherwise ordered by the court.

Whenever any models, diagrams, exhibits, or materials have been offered into evidence and received by the clerk, they shall be removed by the party offering them, except as otherwise directed by the court, within 30 days after final judgment in the trial court if no appeal is taken; if the case is appealed, within 60 days after certification of a final decision from the appellate division. At the time of removal a detailed receipt shall be given to the clerk and filed in the case file.

If the party offering an exhibit which has been placed in the custody of the clerk fails to remove such article as provided herein, the clerk shall write the attorney of record (or the party offering the evidence if he has no counsel) calling attention to the provisions of this rule. If the articles are not removed within 30 days after the mailing of such notice, they may be disposed of by the clerk.

15. Photographs and Reproduction of Court Proceedings.

The taking of photographs in the courtroom, or in the corridors immediately adjacent thereto, during the progress of judicial proceedings, or during any recess thereof, is prohibited. The transmission or recording of such proceedings for broadcast by radio or television is likewise prohibited.

Nonjudicial ceremonies such as administering oaths of office, presentation of portraits, and similar ceremonial occasions, may be photographed in or broadcast from the courtroom under the supervision of the court.

Rule Suspended until Dec. 31, 1984. — The order adopted Sept. 21, 1982, and effective Oct. 18, 1982, provides that this rule and Canon 3A(7) of the Code of Judicial Conduct, published in 276 N.C. at 740, are hereby suspended to and including Dec. 31, 1984, and electronic media and still photograph coverage of public judicial proceedings in the appellate and trial courts of this State shall be allowed on an experimental basis, in accordance with the terms of the order. For the aforementioned order concerning electronic media and still photography coverage of public judicial proceedings, see the contents of this volume.

16. Withdrawal of Appearance.

No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court. (See Smith vs. Bryant, 264 N.C. 208. See also Rule 43 of Rules of the N.C. State Bar, Volume 4(a) of General Statutes of North Carolina, page 278, entitled "Withdrawal from employment as attorney or counsel.")

Editor's Note. — The Rules of the North Carolina State Bar, referred to above, are now found in this Rules Volume.

CASE NOTES

This rule is expressly based on Smith v. Bryant, 264 N.C. 208, 141 S.E.2d 303 (1965). Underwood v. Williams, 69 N.C. App. 171, 316 S.E.2d 342 (1984).

Attorney-Client Relationship Dissolved at Any Time. — As between the attorney and his client, the relationship may, in good faith, be dissolved at any time. High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc., 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977), cert. denied, 439 U.S. 958, 99 S. Ct. 360, 58 L. Ed. 2d 350 (1978).

But Withdrawal from Litigation Must Be Justified. — The attorney may not be released from litigation in which he appears for the client without first satisfying the court that his withdrawal therefrom is justified, and whether he is justified will depend on the circumstances of that particular situation. High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc., 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977), cert. denied, 439 U.S. 958, 99 S. Ct. 360, 58 L. Ed. 2d 350 (1978).

Notice Required. — Where plaintiff's counsel had entered a formal appearance, he was obligated to provide plaintiff with reasonable notice of his intention to withdraw, and where the record failed to show any such facts, on the record plaintiff was entitled to reversal of the summary judgment entered against him immediately upon the withdrawal of his attorney despite plaintiff's request for an opportunity to obtain new counsel. Underwood v. Williams, 69 N.C. App. 171, 316 S.E.2d 342 (1984).

No more than adequate or reasonable notice is required for an attorney to withdraw as attorney of record. Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981).

17. Entries on Records.

No entry shall be made on the records of the Superior or District Court by any person except the clerk, his regular deputy, a person specifically directed by the presiding judge, or the judge himself.

18. Custody of Appellate Reports.

The clerks of the Superior Court shall be officially responsible for the care and preservation of the volumes of the Appellate Division Reports furnished by the State pursuant to G.S. 147-45, and for the General Statutes of North Carolina furnished by the Administrative Office of the Courts under G.S. 7A-300(9).

Each clerk of the Superior Court shall report to the presiding judge of the Superior Court at the first session of court held in January and July each year what volumes, if any, of said reports are missing or have been lost since the last report to the end that the judge may enter an appropriate order for replacement of same pursuant to G.S. 147-51.

19. Recordari; Supersedeas; Certiorari.

The Superior Court shall grant the writ of recordari only upon petition specifying the grounds of the application. The petition shall be verified and the writ may be granted with or without notice. When notice is given the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties. The decision thereupon shall be final, subject to appeal as in other cases. If the petition is granted without notice, the petitioner shall give an undertaking for costs and for the writ of supersedeas, if prayed for. In such case the writ of recordari shall be made returnable to the session of the Superior Court of the county in which the judgment or proceeding complained of was granted, and ten days' written notice shall be given to the adverse party before the session of the court to which the writ is returnable. At that session the respondent may move to dismiss, or may answer the writ, and the answer shall be verified. After hearing the application upon the petition, answer, affidavits, and evidence offered, the court shall dismiss it or order it placed on the trial docket.

In proper cases and in like manner, the court may grant the writ of certiorari. When a diminution of the record is suggested and the record is manifestly imperfect, the court may grant the writ upon motion in the cause.

Cited in State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

20. Sureties.

No member of the bar, in any case, suit, action or proceeding in which he appears as counsel, and no employee of the General Court of Justice, employee of the Sheriff's Department, or other law enforcement officer, shall act as a surety in any suit, action or proceeding pending in any division of the General Court of Justice.

NORTH CAROLINA
........COUNTY

IN THE GENERAL COURT OF JUSTICE
...............COURT DIVISION
FILE #: ....
FILM #: ....

PLAINTIFF
-v-
DEFENDANT

CERTIFICATE OF READINESS

As counsel of record for .... (name the party you represent) who is a plaintiff, defendant, third party, (underline one) hereby certify that:

A. I know of no procedural matters which would delay the trial of the case when called for jury trial;

B. All motions existing of record this date have been heard or otherwise disposed of;

C. I know of no parties or witnesses desired that will not be available on the trial date;

D. I know of no current reason that would cause me to move for a continuance:

E. I am ready for trial.

This the .... day of ....

....
Attorney

IN THE GENERAL COURT OF JUSTICE
.... COURT DIVISION

Plaintiff(s)
-v-
Defendant(s)

FILE #: ....
FILM #: ....

ORDER ON FINAL PRE-TRIAL CONFERENCE

Pursuant to the provisions of Rule 16 of the State Rules of Civil Procedure, and Rule 7, General Rules of Practice, a final pre-trial conference was held in the above-entitled cause on the ...... day of .... 19.. ...., Esquire, appeared as counsel for the plaintiff(s); .... Esquire, appeared as counsel for the defendant(s).

(1) It is stipulated that all parties are properly before the court, and that the court has jurisdiction of the parties and of the subject matter.

Note: If the facts are otherwise, they should be accurately stated.

(2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoiner of parties.

Note: If the facts are otherwise, they should be accurately stated.

(3) If any of the parties is appearing in a representative capacity, it should be set out whether there is any question concerning the validity of the appointment of the representatives. Letters or orders of appointment should be included as exhibits.

(4) Any third-party defendant(s) or cross-claimant(s) should follow the same procedure as set out in paragraphs (4) and (5) for plaintiff(s) and defendant(s).

(5) In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts:

(a)

(b)

Note: Here set out all facts not in genuine dispute.*

(6) The following is a list of all known exhibits the plaintiff(s) may offer at the trial:

(a)
(b)

Note: Here list the pre-trial identification numbers and a brief description of each exhibit.

(7) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the plaintiff(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

Note: Here set out with particularity the basis of objection to specific exhibits.

It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(8) It is stipulated and agreed that each of the exhibits identified by the plaintiff(s) is genuine and, if relevant and material, may be received in evidence without further identification or proof, except:

(9) The following is a list of all known exhibits the defendant(s) may offer at the trial:

(a)
(b)

---

*IN CONTRACT CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) whether the contract relied on was oral or in writing; (b) the date thereof and the parties thereto; (c) the substance of the contract, if oral; (d) the terms of the contract which are relied upon and the portions in controversy; (e) any collateral oral agreement, if claimed, and the terms thereof; (f) any specific breach of contract claimed; (g) any misrepresentation of fact claimed; (h) if modification of the contract or waiver of covenant is claimed, what modification or waiver, and how accomplished, and (i) an itemized statement of damages claimed to have resulted from any alleged breach, the source of such information, how computed, and any books or records available to sustain such damage claimed.

IN MOTOR VEHICLE NEGLIGENCE CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) the owner, type and make of each vehicle involved; (b) the agency of each driver; (c) the place and time of accident, conditions of weather, and whether daylight or dark; (d) nature of terrain as to level, uphill or downhill; (e) traffic signs, signals and controls, if any, and by what authority placed; (f) any claimed obstruction of view; (g) presence of other vehicles, where significant; (h) a detailed list of acts of negligence or contributory negligence claimed; (i) specific statutes, ordinances, rules, or regulations alleged to have been violated, and upon which each of the parties will rely at the trial to establish negligence or contributory negligence; (j) a detailed list of nonpermanent personal injuries claimed, including the nature and extent thereof; (k) a detailed list of permanent personal injuries claimed, including nature and extent thereof; (l) the age of any party alleged to have been injured; (m) the life and work expectancy of any party seeking to recover for permanent injury; (n) an itemized statement of all special damages, such as medical, hospital, nursing, etc., with the amount and to whom paid; (o) if loss of earnings is claimed; (p) a detailed list of any property damages, and (q) in death cases, the decedent's date of birth, marital status, employment for five years before date of death, work expectancy, reasonable probability of promotion, rate of earnings for five years before date of death, life expectancy under mortuary table, and general physical condition immediately prior to date of death.

IN THE EVENT THIS CASE DOES NOT FALL WITHIN ANY OF THE CATEGORIES ENUMERATED ABOVE, OR ANY OF THE CATEGORIES SUGGESTED BY THIS FORM, COUNSEL SHOULD, NEVERTHELESS, SET FORTH THEIR POSITIONS WITH AS MUCH DETAIL AS POSSIBLE.

Note: Here list the pre-trial identification and a brief description of each exhibit.

(10) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the defendant(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

(11) It is stipulated and agreed that each of the exhibits identified by the defendant(s) is genuine, and, if relevant and material, may be received in evidence without further identification or proof, except:

Note: Here set out with particularity the basis of objection to specific exhibits. It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(12) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to exhibits as required of plaintiff(s) and defendant(s).

Note: Attention is called to the provisions of the pre-trial rule with respect to the obligation to immediately notify opposing counsel if additional exhibits are discovered after the preparation of this order.

(13) The following is a list of the names and addresses of all known witnesses the plaintiff(s) may offer at the trial:

Note: If either plaintiff or defendant's attorney discover additional witnesses after this listing, attention is called to obligation to notify opposing counsel. There shall be no requirement that all witnesses listed by a party be used, and the court may after satisfactory explanation, in his discretion, permit the use of a witness not listed.

The trial judge may, for good cause made known to him, relieve a party of the requirement of disclosing the name of any witness.

(14) The following is a list of the names and addresses of all known witnesses the defendant(s) may offer at the trial:

(15) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to witnesses as above outlined for plaintiff(s) and defendant(s). Counsel shall immediately notify opposing counsel if the names of additional witnesses are discovered after the preparation of this order.

(16) There are no pending motions, and neither party desires further amendments to the pleadings, except:

Note: Here state facts regarding pending or impending motion. If any motions are contemplated, such as motion for the physical examination of a party, motion to take the deposition of a witness for use as evidence, etc., such motions should be filed in advance of the final pre-trial conference so that they may be ruled upon, and the rulings stated in the final pre-trial order. The same procedure should be followed with respect to any desired amendments to pleadings.

(17) Additional consideration has been given to a separation of the triable issues, and counsel for all parties are of the opinion that a separation of issues in this particular case would (would not) be feasible.

(18) The plaintiff(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

(19) The defendant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

(20) Any third-party defendant(s) and cross-claimant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

Note: In all instances possible, the parties should agree upon the triable issues and include them in this order in the form of a stipulation, in lieu of the three preceding paragraphs.

(21) Counsel for the parties announced that all witnesses are available and the case is in all respects ready for trial. The probable length of the trial is estimated to be .... days.

(22) Counsel for the parties represent to the court that, in advance of the preparation of this order, there was a full and frank discussion of settlement possibilities. Counsel for the plaintiff will immediately notify the clerk in the event of material change in settlement prospects.

Note: Counsel shall be required to conduct a frank discussion concerning settlement possibilities at the time of the conference of attorneys, and clients shall either be consulted in advance of the conference concerning settlement figures or be available for consultation at the time of the conference. The court will make inquiry at the time of trial as to whether this requirement was strictly observed.

....
Counsel for Plaintiff(s)

....
Counsel for Defendant(s)

Date:................ Approved and Ordered Filed.

....
Judge Presiding

CASE NOTES

Cited in State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984).

21. Jury Instruction Conference.

At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.[1]

At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

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[1] In criminal cases, the provisions of G.S. 15A-1231 are also applicable.

The court may recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; or (ii) to inform the jury on a point of law which should have been covered in the original instructions. The provisions of the first two paragraphs of this Rule 21 also apply to the giving of all additional instructions, except that the court in its discretion shall decide whether additional argument will be permitted. (Added September 15, 1981.)

CASE NOTES

Rule 10(b)(2) of the Rules of Appellate Procedure and this rule were designed to prevent unnecessary new trials caused by errors in instructions that the court could have corrected if brought to its attention at the proper time. This policy is met when a request to alter an instruction has been submitted and the trial judge has considered and refused the request. In most instances, it is obvious that further objection at the close of the instructions would be unavailing. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

Conference Need Not Be Recorded. — The rule does not require that the conference be on the record. State v. Thompson, 59 N.C. App. 425, 297 S.E.2d 177 (1982), appeal dismissed and cert. denied, 307 N.C. 582, 299 S.E.2d 650 (1983).

This rule does not require that the instruction conference be recorded or that the judge's proposed charge be reduced to writing and submitted to counsel. By the very wording of the rule itself, it is clear that the instruction conference contemplated by this rule shall be held "for the purpose of discussing the proposed instructions" and providing an opportunity for counsel to object to any of the instructions proposed by the judge or to request additional instructions. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982).

Conference Not Recorded Absent Request. — Where either party to the trial desires a recorded instruction conference, § 15A-1231(b) requires that party to make such a request to the trial judge. Absent such a request, § 15A-1231(b) is silent and this rule supplements the statute (pursuant to § 7A-34) by requiring the trial court to hold an unrecorded conference. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983); State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Section 15A-1231 and this rule require the trial court to hold an unrecorded conference in every case and a recorded conference when requested by either party. State v. Clark, 71 N.C. App. 55, 322 S.E.2d 176 (1984).

No Conflict with § 15A-1231(b). — Since this rule requires a conference without regard to whether it is requested by a party and § 15A-1231(b) requires a recorded conference only at the request of either party, there is no conflict between the two provisions. Both may be given full effect. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983).

Failure to Request Conference. — Where defendant did not request an instruction conference, he cannot assert as error the trial court's failure to conduct one. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

Subsection (b) of § 15A-1231 clearly contemplates that a defendant is required to request an instruction conference as a prerequisite for assigning error to the trial court's failure to conduct one. Pursuant to the provisions of § 7A-34, the provision of this rule which requires the trial judge to conduct a jury instruction conference conflicts with subsection (b) of § 15A-1231 and must give way to the provisions of the statute. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

Failure to make contemporaneous objection to the jury charge prevents the court from recalling the jury to correct allegedly prejudicial errors; such failure constitutes a waiver of the right to challenge the instructions on appeal. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

Where record is silent as to whether a jury instruction conference was held, the defendant must hold himself accountable. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Where no instruction conference is held, the defendant should seek a stipulation from the State pursuant to N.C.R. App. P. Rule 11(a) acknowledging the trial court's failure in this regard. Where the State refuses to agree to the stipulation, and objects to such a notation in the record, the defendant should request that trial judge settle the record on appeal pursuant to N.C.R. App. P. Rule 11(c). Where the record is silent, it will be presumed that the trial court acted correctly. State v. Nealy, 64 N.C.

App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Where defense counsel submitted a written request for particular instructions prior to the jury arguments, which the court denied, defendant was not required by either Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure or this rule to repeat his objection to the jury instructions in order to properly preserve his exception for appellate review. State v. Smith, 311 N.C. 287, 316 S.E.2d 73 (1984).

Applied in Radford v. Norris, 63 N.C. App. 501, 305 S.E.2d 64 (1983); Harris v. Scotland Neck Rescue Squad, Inc., — N.C. App. —, 331 S.E.2d 695 (1985).

Stated in Penley v. Penley, — N.C. —, 332 S.E.2d 51 (1985).

Cited in State v. Owens, 61 N.C. App. 342, 300 S.E.2d 581 (1983); State v. Thompson, 62 N.C. App. 38, 302 S.E.2d 310 (1983).

22. Local Court Rules.

In order to insure general uniformity throughout each respective judicial district, all trial judges shall observe and enforce the local rules in effect in any judicial district where they are assigned to hold court. The senior resident judge shall see that each judge assigned to hold a session of court in his district is furnished with a copy of the local court rules at or before the commencement of his assignment. (Added September 21, 1981.)

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ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

Index follows these rules.

Effective 18 October 1982, Canon 3A(7) of the Code of Judicial Conduct and Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, published in 276 N.C. at 740, are hereby suspended to and including 31 December 1984, and electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this State shall be allowed on an experimental basis, in accordance with the terms of this order.

Rule
1. Definition.
2. Coverage allowed.
3. Location of equipment and personnel.
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5. Equipment and personnel.
6. Sound and light criteria.
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9. Impermissible use of media material.

Editor's Note. — The order concerning electronic media and still photography coverage of public judicial proceedings, adopted by the Supreme Court on September 21, 1982, as amended November 10, 1982, was extended through and including December 31, 1985, by order of the Supreme Court of December 19, 1984, provided that at least twelve trials shall be televised during the period January 1, 1985, through October 31, 1985, to the end that the Court may make a fair determination as to the effect of television on the conduct of the trials.

1. Definition.

The terms "electronic media coverage" and "electronic coverage" are used in the generic sense to include coverage by television, motion picture and still photography cameras, broadcast microphones and recorders.

2. Coverage allowed.

Electronic media and still photography coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this State, subject to the conditions below.

(a) The presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings.

(b) Coverage of the following types of judicial proceedings is expressly prohibited: adoption proceedings, juvenile proceedings, proceedings held before clerks of court, proceedings held before magistrates, probable cause proceedings, child custody proceedings, divorce proceedings, temporary and permanent alimony proceedings, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and *in camera* proceedings.

(c) Coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, and victims and families of victims of sex crimes.

(d) Coverage of jurors is prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The trial judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision which is designated 2(d).

3. Location of equipment and personnel.

(a) The location of equipment and personnel necessary for electronic media and still photographic coverage of trial proceedings shall be at a place either inside or outside the courtroom in such a manner that equipment and personnel are completely obscured from view from within the courtroom and not heard by anyone inside the courtroom.

(i) If located within the courtroom, this area must be set apart by a booth or other partitioning device constructed therein at the expense of the media. Such construction must be in harmony with the general architectural style and decor of the courtroom and must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(ii) If located outside the courtroom, any booth or other partitioning device must be built so that passage to and from the courtroom will not be obstructed. This arrangement must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(b) Appropriate openings to allow photographic coverage of the proceedings under these rules may be made in the booth or partitioning device, provided that no one in the courtroom will see or hear any photographic or audio equipment or the personnel operating such equipment. Those in the courtroom are not to know when or if any such equipment is in operation.

(c) Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the courtroom.

(d) Media personnel shall not exit or enter the booth area or courtroom once the proceedings are in session except during a court recess or adjournment.

(e) Electronic media equipment and still photography equipment shall not be taken into the courtroom or removed from the designated media area except at the following times:

(i) Prior to the convening of proceedings;

(ii) During the luncheon recess;

(iii) During any court recess with the permission of the presiding justice or judge; and

(iv) After adjournment for the day of the proceedings.

(f) The Chief Justice of the Supreme Court, and the Chief Judge of the Court of Appeals, may waive the requirements of rule 3(a) and (b) with respect to judicial proceedings in the Supreme Court and in the Court of Appeals, respectively.

4. Official representatives of the media.

(a) This Court hereby designates the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, as the official representatives of the news media. The governing boards of these associations shall designate one person to represent the television media, one person to represent the radio broadcasters, and one person to represent still photographers in each county in which electronic media and still photographic coverage is desired. The names of the persons so designated shall be forwarded to the Senior Resident Superior Court Judge, the Director of the Administrative Office of the Courts, and the county manager or other official responsible for administrative matters in the county or municipality in which coverage is desired. Thereafter, these persons shall conduct all negotiations with the appropriate officials concerning the construction of the booths or partitioning devices referred to above. Such persons shall also be the only persons authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.

(b) It is the express intent and purpose of this rule to preclude judges and other officials from having to "negotiate" with various representatives of the news media. Since these rules require pooling of equipment and personnel, cooperation by the media is of the essence and the designation of three media representatives is expressly intended to prevent presiding judges from having to engage in discussion with others from the media.

5. Equipment and personnel.

(a) Not more than two television cameras shall be permitted in any trial or appellate court proceedings.

(b) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(e) In no event shall the number of personnel in the designated area exceed the number necessary to operate the designated equipment or which can comfortably be secluded in the restricted area.

6. Sound and light criteria.

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.

7. Courtroom light sources.

With the concurrence of the Senior Resident Superior Court Judge of the judicial district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense and provided such modifications or additions are approved by the governing body of the county or municipality which owns the facility.

8. Conferences of counsel.

To protect the attorney-client privilege and the right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench.

9. Impermissible use of media material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceedings subsequent and collateral thereto, or upon any retrial or appeal of such proceedings.

Editor's Note. — This order was adopted September 21, 1982, amended November 10, 1982, and extended to December 31, 1984.

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NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted June 13, 1975.

Index follows these rules.

These rules were promulgated by the Court under the rule-making authority conferred by Article IV, § 13(2) of the Constitution of North Carolina. They are effective with respect to all appeals taken from orders and judgments of the Superior Courts, the District Courts, the North Carolina Industrial Commission, the North Carolina Utilities Commission and the Commissioner of Insurance of North Carolina in which notice of appeal was given on and after July 1, 1975. As to such appeals, these rules supersede the Rules of Practice in the Supreme Court of North Carolina, 254 N.C. 783 (1961), as amended; the Supplementary Rules of the Supreme Court, 271 N.C. 744 (1967), as amended; and the Rules of Practice in the Court of Appeals of North Carolina, 1 N.C. App. 632 (1968), as amended. With respect to all appeals in which notice of appeal was given prior to July 1, 1975, the rules of court and statutes then controlling appellate procedure are continued in force as the Rules of Practice of the Courts of the Appellate Division until final disposition of the appeals.

The Drafting Committee Notes and an Appendix of Tables and Forms prepared by the Committee are published with the rules for their possible helpfulness to the profession in the early stages of experience with these rules. Although authorized to be published for this purpose, they are not authoritative sources on parity with the rules.

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ARTICLE I. APPLICABILITY OF RULES

Rule 1

Scope of Rules: Trial Tribunal Defined

(a) **Scope of Rules.** These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) **Rules Do Not Affect Jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) **Definition of Trial Tribunal.** As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division. (Amended February 1, 1985.)

Drafting Committee Note

Sources or parallels in former rules or statutes: None.

Commentary.

Subdivision (a) charts the coverage of this unitary set of Rules of Appellate Procedure as promulgated by the Supreme Court effective July 1, 1975. This coverage includes all appeals to and review by the Court of Appeals and the Supreme Court. It does *not* include certain other "appeals" within the General Court of Justice: i.e. appeals from clerk of superior court to judge of superior court under §§ 1-272 et seq.; from quasi-judicial bodies to superior court, as under §§ 143-306 et seq. [repealed]; and from magistrate to district court for trial de novo under §§ 7A-228 et seq.

Subdivision (b) expresses a fundamental limitation on the scope of the rule-making power of the Supreme Court under which these Rules are promulgated. The essential rule-making power is grounded in the Constitution which, in Art. IV, § 13(2), confers upon the Supreme Court the "exclusive authority to make rules of procedure and practice for the Appellate Division." The same section forbids exercise of that power in a way which would "abridge substantive rights or abrogate or limit the right of trial by jury." This Rule further disclaims any power or intention by the Court that the Rules be interpreted in any way to alter the jurisdiction of the courts of the appellate division as prescribed by Constitution and statute. This simply expresses a further restriction on the rule-making power which, though not explicit in the Constitution as is the limitation above noted, is certainly implicit in the general "separation of powers" provision, Art. I, § 6.

Subdivision (c) is self-explanatory.

CASE NOTES

I. In General.
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I. IN GENERAL.

Mandatory. — The North Carolina Rules of Appellate Procedure are mandatory, and for violation of the rules an appeal is subject to dismissal. State v. Gillespie, 31 N.C. App. 520, 230 S.E.2d 154 (1976), cert. denied, 291 N.C. 713, 232 S.E.2d 205 (1977); State v. Edmonds, 59 N.C. App. 359, 296 S.E.2d 802 (1982), cert. denied and appeal dismissed, 307 N.C. 470, 299 S.E.2d 224, vacated on other grounds, 308 N.C. 362, 302 S.E.2d 223, cert. denied, 309 N.C. 323, 307 S.E.2d 167 (1983); State v. Greene, 59 N.C. App. 360, 296 S.E.2d 802 (1982), rev'd, cert. denied and appeal dismissed, 308 N.C. 192, 302 S.E.2d 246, 309 N.C. 458, 306 S.E.2d 771 (1983); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982); Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984); In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985).

The North Carolina Rules of Appellate Procedure are mandatory. Ledwell v. County of Randolph, 31 N.C. App. 522, 229 S.E.2d 836 (1976); State v. Motsinger, 31 N.C. App. 594, 230 S.E.2d 205 (1976), cert. denied, 291 N.C. 714, 232 S.E.2d 202 (1977); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); State v. Lesley, 33 N.C. App. 237, 234 S.E.2d 476 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); State v. Puckett, 54 N.C. App. 576, 284 S.E.2d 326 (1981).

The rules of this court, governing appeals, are mandatory and not directory. They may not be disregarded or set at naught (1) by act of the legislature, (2) by order of the judge of the superior court, (3) by consent of litigants or counsel. The court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982).

Applied in Stephenson v. Rowe, 69 N.C. App. 717, 318 S.E.2d 324 (1984).

Quoted in Byrd v. Alexander, 32 N.C. App. 782, 233 S.E.2d 654 (1977); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); State v. Oxendine, 43 N.C. App. 391, 258 S.E.2d 810 (1979); Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983).

Cited in Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rules 1 and 4, Rules of Practice in the Supreme Court of North Carolina.

The rules of the Supreme Court are mandatory, not directory. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922); Washington County v. Norfolk S. Land Co., 222 N.C. 637, 24 S.E.2d 338 (1943); Warshaw v. Warshaw, 236 N.C. 754, 73 S.E.2d 900 (1952); Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962); Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966).

The rules of practice in the Supreme Court are mandatory and will be enforced. Williams v. Boulerice, 269 N.C. 499, 153 S.E.2d 95 (1967); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

The rules of the Supreme Court have been dictated by experience and stem from a desire to expedite business. They are mandatory and will be enforced. State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534, cert. denied, 400 U.S. 946, 91 S. Ct. 253, 27 L. Ed. 2d 252 (1970).

The impression seems to prevail to some extent that the rules of practice prescribed by the supreme court are merely directory — that they may be ignored, disregarded, and suspended almost as of course. This is a serious mistake. The Supreme Court has ample authority to make them. They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the Supreme Court will certainly see that they have effect and are duly observed whenever they properly apply. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

Exclusive Power to Make Rules. — The Supreme Court is given, by N.C. Const., Art. IV, § 13(2), exclusive power to make its own rules of practice, without legislative authority to interfere, and in case of conflict the rules made by the Supreme Court will be observed. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

The General Assembly can enact no rules of practice and procedure for the Supreme Court. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

Dismissal of Appeal for Noncompliance with Rules. — Ordinarily motions to dismiss appeals will be allowed, upon a failure to comply with the rules of the Supreme Court, without discussing the merits of the case. Davis v. Wall, 142 N.C. 450, 55 S.E. 350 (1906).

Rule 2

Suspension of Rules

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

Drafting Committee Note

Sources or parallels in former rules or statutes: None.

Commentary. This Rule expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases where this is necessary to accomplish a fundamental purpose of the rules. The power does not of course depend upon its express reservation by the Court in the body of the Rules. It is included here as a reminder to counsel that the power does exist, and that it may be drawn upon by either appellate court where the justice of doing so or the injustice of failing to do so is made clear to the court. The phrase "except as otherwise expressly provided" refers to the provision in Rule 27(c) that the time limits for taking appeal laid down in these Rules (i.e. Rules 14 and 15) or in "jurisdictional" statutes which are then replicated or cross-referred in these Rules, i.e. Rules 3 (civil appeals), 4 (criminal appeals) and 18 (agency appeals), may not be extended by any court.

CASE NOTES

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

Consideration of Constitutional Questions Not Properly Raised Below. — While the Supreme Court will generally refrain from deciding constitutional questions which are not raised or passed upon in the trial court or properly presented in the Court of Appeals, the court may pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Although defendant's conditional cross-appeal had not been properly preserved for appellate review, in the interests of judicial economy the Supreme Court may elect pursuant to this rule to consider the merits of defendant's arguments. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

Although the appellant failed to identify various exceptions upon which its assignments of errors were based, as required by Rule 28(b)(5), the court deemed it appropriate, pursuant to this rule, to dispose of the appeal on the merits. State Employee's Credit Union, Inc. v. Gentry, — N.C. App. —, 330 S.E.2d 645 (1985).

Consideration of Judgment as to Attorney Fees Despite Failure to Present and Argue Issue. — Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under § 7A-32(c) or pursuant to this rule, could consider on its own initiative the question of the attorney fees award and give relief as a matter of appellate grace. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Applied in Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784 (1979); Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980); State v. Cohen, 301 N.C. 220, 270 S.E.2d 416 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980); Oroweat Employees Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980); State v. Stafford, 48 N.C. App. 740, 269 S.E.2d 739 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731 (1981); Peoples Serv. Drug Stores, Inc. v. Mayfair, 50 N.C. App. 442, 274 S.E.2d 365 (1981); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Poplin, 304 N.C. 185, 282 S.E.2d 420 (1981); State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982); State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982); State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982); State v. Thompson, 62 N.C. App. 38, 302 S.E.2d 310 (1983); State v. Herbin, 64 N.C. App. 711, 308 S.E.2d 338 (1983); State v. Norfleet, 65 N.C. App. 355, 309 S.E.2d 260 (1983); Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); Wachovia Bank & Trust Co. v. Guthrie, 67 N.C. App. 622, 313 S.E.2d 603 (1984); In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); State v. Woodruff, 70 N.C. App. 561, 321 S.E.2d 1 (1984); State v. Sanders, 312 N.C. 318, 321 S.E.2d 836 (1984); State v. Albert, 312 N.C. 567, 324 S.E.2d 233 (1985); State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985); In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985); Sanyo Elec., Inc. v. Albright Distrib. Co., — N.C. App. —, 331 S.E.2d 738 (1985); Wilkins v. Green, — N.C. App. —, 332 S.E.2d 507 (1985); Sessoms v. Sessoms, — N.C. App. —, 332 S.E.2d 511 (1985); In re Parker, — N.C. App. —, 333 S.E.2d 749 (1985).

Quoted in Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880 (1981).

Stated in Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27 (1981); State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981); In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983).

Cited in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); City of Hickory v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978); Smith v. Pacific Intermountain Express Co., 39 N.C. App. 249, — S.E.2d — (1978); State v. Williams, 300 N.C. 190, 265 S.E.2d 215 (1980); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Hargrove, 60 N.C. App. 174, 298 S.E.2d 402 (1982); State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983); State v. Bartlett, 64 N.C. App. 388, 307 S.E.2d 178 (1983); Schell v. Coleman, 65 N.C. App. 91, 308 S.E.2d 662 (1983); Plymouth Fertilizer Co. v. Selby, 67 N.C. App. 681, 313 S.E.2d 885 (1984); Stanley v. Nationwide Mut. Ins. Co., 71 N.C. App. 266, 321 S.E.2d 920 (1984); State v. Reilly, — N.C. —, 329 S.E.2d 381 (1985).

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3

Appeal in Civil Cases — How and When Taken

(a) **From Judgments and Orders Rendered in Session.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by

(1) giving oral notice of appeal at trial, or at any hearing of a timely motion under Rule 59 of the Rules of Civil Procedure for a new trial or to alter or amend a judgment, or under Rule 50 of the Rules of Civil Procedure for

judgment notwithstanding the verdict with or without a motion for a new trial; or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) **From Judgments and Orders Rendered Out of Session.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding out of session may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(c) **Time When Taken by Written Notice.** If not taken by oral notice as provided in Rule 3(a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under Rule 50(b) for judgment n.o.v. whether or not with conditional grant or denial of new trial; (ii) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) a motion under Rule 59 to alter or amend a judgment; (iv) a motion under Rule 59 for a new trial. If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivisions (a)(2) and (b) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

Drafting Committee Note

Sources or parallels in former rules or statutes. Subdivisions (a), (b), (c): §§ 1-279, 1-280. Subdivisions (d) and (e): None.

Commentary.

Subdivision (a) carries forward the traditional code practice which has permitted appeal to be taken from judgments rendered during a session of court by either of two means: 1) oral notice given "at trial," or 2) written notice filed and served within a specified period (10 days from "entry" per subdivision (c)). The opportunity to give oral notice is extended by the Rule to other settings than the traditional "at trial" and "during a session," to include additionally the setting described as "at a hearing" on any of the typical post-verdict motions under Rules 50 and 59 of the Rules of Civil Procedure. The phrases "during a session" and "at trial" are carried forward from the old code statutory sections to describe the traditional setting for oral notice. Although questions could always have existed as to when "trial" begins and ends, bench and bar have always equated "at trial" with "in open court" and there simply has not been this difficulty. See, e.g., *Mason v. Commrs. of Moore County,* 229 N.C. 626, at 627, 628 (1948). The underlying notion behind charging all parties with notice of appeal given orally "at trial" is undoubtedly the same as that which dictates that oral *motions* suffice to charge all persons with notice when made during the course of trial, a principle long recognized in our pre-1970 code practice, *Collins v. N. C. State Hwy. & P.W. Comm.,* 237 N.C. 277 (1953), and now expressly embodied in N.C.R.Civ.P. 7(b)(1). It is in keeping with this principle that the Rule now extends the opportunity for giving oral notice of appeal to these specific, frequently used post-verdict motion hearings. Here too it seems fair to charge with notice, since parties must have been given notice of the hearings themselves. N.C.R.Civ.P. 7(b)(1), 5(a). In any event, an appellant may always elect in either setting to give written notice (within the prescribed period) rather than oral notice. And if, as will frequently be the case, the hearing is adjourned without ruling, the appellant will perforce have to use written notice when the order is later entered.

This Rule does not speak to the related matter of providing a record entry of the fact that appeal has been duly taken by either mode. The code provision, former § 1-280, cryptically required that, however appeal was taken, the appellant should "cause his appeal to be entered by the clerk on the judgment docket." This requirement of formal entry "on the judgment docket" was early held not mandatory, just so long as the record showed in some adequate way that appeal was duly taken by either mode. *Atkinson v. Asheville St. Ry.*, 113 N.C. 581 (1893). The traditional way of insuring this record entry — particularly appropriate for the oral notice — came to be by using practically standardized "appeal entries" which, along with recitations concerning security and time-tables for perfecting appeal, contain a notation that appeal has duly been taken. These Rules carry forward the developed requirement of such record entry. See Rule 9(b)(ix). This latter provision clearly authorizes continued use of the customary "appeal entries" to record the taking of appeal by oral notice. In the case of appeal by filing written notice, a copy of the written notice, with filing date per Rule 9(c)(3), will clearly suffice as the record entry of the fact that appeal has been duly taken. See Committee Form 5 "Appeal Entries," with explanatory Note.

Subsection (2) of subdivision (a) requires that service of copies of a written notice of appeal be made by the appellant upon all *other* parties, not just *adverse* parties as under the formerly controlling code provision, now repealed § 1-280. The primary reason for extending the requirement of notice to other than adverse parties is to tie into the provision of subdivision (c) which tolls the time for taking appeal as to all other parties when any party takes a timely appeal. Another reason is that it may sometimes be difficult to determine just who is such an "adverse" party. Co-parties may in some situations be "adverse." *Rose v. Baker,* 99 N.C. 323 (1888) (interest of co-defendant not given notice of appeal may not be adversely affected upon appellate review). This rule avoids any necessity for making such a determination. Rule 26, which is cross-referred in subdivision (c) of this Rule for the manner of making service, provides such simple and ready means that the requirement of all-party service seems not burdensome.

Subdivision (b) carries forward the traditional practice by which appeals from judgments not rendered in session (hence not subject to appeal by oral notice "at trial") may of course be taken by filing and serving written notice of appeal within the time provided in subdivision (c).

Subdivision (c) provides the timetable for taking appeal by written notice. It thus is in play in all situations where appeal is not taken by oral notice. The basic time limit is the traditional 10 days of code practice. But this time commences to run from a different point than did the period under former statutes (as judicially interpreted). Under former law, the time was stated to run from the date of "rendition" of a judgment in session, and from the date of "notice" of a judgment rendered out of session. § 1-279. By judicial interpretation these points in time had been fixed, respectively, as the last day of the session and as the date when the judgment was filed in the clerk's office. 2 McIntosh, *North Carolina Practice and Procedure in Civil Cases,* § 1783(1) 2d ed. (1956). Under this Rule 3 the time begins to run with respect to *any* civil judgment, whether rendered in or out of session, from the date of its "entry." "Entry" is a word of art with a precise meaning now dictated by Rule 58 of the Rules of Civil Procedure. However satisfactory the procedure under Civil Rule 58 generally, its clear specification of the act which accomplishes "entry" of a judgment of any kind, coupled with its requirement that this be made a matter of record, provides counsel with sure means of determining for purposes of appeal that judgment has been entered and the time of its entry. This subdivision contains two other important innovations. The first causes the running of appeal time to be tolled by the filing of a post-verdict motion under either Rule 50, 52 or 59 of the Rules of Civil Procedure, with the period recommencing upon the entry of an order upon the motion. (A result only partially achieved by 1971 amendment to § 1-279 which gave this effect only to Rule 59 motions.) The second avoids any further need for the so-called "protective" appeal by a party who is content to abide the judgment unless some other party takes appeal, but who wants to go up as an appellant if this transpires, and who therefore has been forced to give notice of appeal against the possibility that another party will take appeal at the last moment. This awkwardness is avoided by the provision that the timely taking of appeal by any party automatically gives all other parties 10 additional days from that time to note appeal.

Subdivision (d) includes a new requirement of specific elements to be included in a written notice of appeal. These conform to generally accepted ideas of what such a notice should contain and, indeed, to customary practice in this state. See F.R.App.P. 3(c) and 3 *Douglas Forms,* Form 1168. In particular, the specification of the exact order or the portion of a judgment from which appeal is taken may save against occasional confusion. Federal courts under a comparable rule have not commonly treated any but the most misleading error in the required specification as vitiating the appeal. See, e.g., *Higginson v. U.S.,* 384 F. 2d 504 (6th Cir. 1967) (wrong order designated; deemed corrected by correct identification in brief); *Graves v. General Insurance Corp.,* 381 F. 2d 517 (10th Cir. 1967) (designation of wrong court harmless under circumstances). See Committee Forms 1 and 2.

Subdivision (e)'s cross-reference to the general "Filing and Service" rule, Rule 26, is made in order to insure counsel's attention to the variety of means by which service of the required copies of the notice of appeal may be made. See Commentary to subdivision (a), section (2). Since "taking" appeal by written notice requires both filing and service within the 10-day period, App. R. 3(a)(2), counsel must be careful to effect *service* as well as filing within the time. The most obvious way to do this is by the use of mail which, properly posted, is effective upon posting, or, where convenient, hand delivery to counsel or to an employee or partner at his office. App. R. 26(c). Service by an officer, though authorized by this same subdivision of Rule 26, is of course less subject to control, and will be effective only upon consummation of service.

General. It should be noted that the statutes which have heretofore been the sole sources for the procedure in "taking" appeal, §§ 1-279, 1-280 (for civil appeals) and § 15-180 (which for criminal appeals simply borrowed the civil procedure), have been substantially amended to incorporate the basic changes in this procedure which is now incorporated in this Rule 3 and in following Rule 4 (for criminal appeals). Indeed, the controlling statutes and Rules now simply replicate each other. See § 1-279, as rewritten in 1975, and § 15-180.3, enacted in 1975, to parallel the two rules in the respects described in the rule commentaries.

Legal Periodicals. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Subsection (a) is almost identical to § 1-279(a). Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

The provisions of § 1-279 and this rule are jurisdictional and unless these statutes are complied with, the appellate court acquires no jurisdiction of the appeal and it must be dismissed. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983).

The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of both § 1-279 and this Rule and Rule 26 are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

Failure to give timely notice of appeal in compliance with § 1-279 and this rule, is jurisdictional, and an untimely attempt to appeal must be dismissed. Booth v. Utica Mut. Ins. Co., 308 N.C. 187, 301 S.E.2d 98 (1983).

Section 1-279 and this rule requires both filing and service of notice of appeal within 10 days after entry of judgment. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Where the appeal is taken more than ten days after the "entry" of judgment and the time within which the appeal can be taken is not otherwise tolled as provided in this rule and in § 1-279, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. Cochrane v. Sea Gate, Inc., 42 N.C. App. 375, 256 S.E.2d 504 (1979).

Announcing of the court's decision in open court constitutes "entry" for purposes of determining when notice of appeal must be filed, even if the formal written order is not written until a later date, since § 1A-1, Rule 58, provides that the rendering of judgment in open court constitutes entry of judgment for purposes of those rules. In re Moore, 306 N.C.

394, 293 S.E.2d 127, rehearing denied, 306 N.C. 565, — S.E.2d — (1982), appeal dismissed, 459 U.S. 1137, 103 S. Ct. 776, 74 L. Ed. 2d 987 (1983).

For purposes of determining when notice of appeal must be given, the court's announcement of its decision in open court constitutes entry of judgment even if a formal written order is not filed until a later date. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

Appeal may be taken by giving oral notice of appeal at trial, but an appeal so taken is by its nature limited to the issues dealt with in the judgment announced and cannot apply to subsequent written orders determining other issues in the same case. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

An appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider in order for the appellate court to be vested with jurisdiction to determine such matters. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

However, where defendants' Rule 12(b)(6) defense was converted and merged automatically into their Rule 56 motion, plaintiff's failure to mention specifically in her notice of appeal that portion of the trial court's order sustaining defendant's defense under Rule 12(b)(6) did not deprive the Court of Appeals of jurisdiction to hear plaintiff's appeal. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

Letter to Clerk Not Written Notice of Appeal. — In an action challenging a divorce judgment where the defendant wrote a letter to the clerk of the court explaining her reasons for not attending the divorce proceedings and requesting that the judgment decreeing the divorce be set aside, the letter was not a written notice of appeal of a divorce judgment showing that the defendant sought a review by the Court of Appeals but was a § 1A-1, Rule 59 motion for a new trial, and the trial court had no authority to cause an appeal to be entered for the defendant absent her request. Williford v. Williford, 51 N.C. App. 150, 275 S.E.2d 216 (1981).

Improper Appeal Criticized, But Acceptable Where Actual Notice Was Had. — While notice of appeal of a judgment rendered out of session was required by section (b) of this rule to be filed with the clerk and served on the other parties, steps taken by appellant in an attempt to perfect its appeal were minimally acceptable where the respondents were in fact put on actual notice of applicant's intent to appeal from any adverse decision where applicant stated in open court that it would appeal if it lost, and the applicant in open court requested that the proposed judgment to be submitted by respondents contain appeal entries so that applicant's notice of appeal would be perfected if the court should sign the proposed judgment; this procedure should not be repeated, however, as this rule clearly states the proper procedures to be strictly followed. In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Though clerk's notation in minutes of court is ordinarily date from which time for notice of appeal under subdivision (c) of this Rule runs, where the trial judge directed that the date of entry of the court's written order and not the earlier date of the hearing was the date of entry for purposes of appeal, the clerk should not have noted an entry of judgment on the date of the hearing. Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345 (1980), overruled on other grounds, Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

Notice of appeal must be served on the opposing party either before the notice is filed or on the same day the notice is filed. Shaw v. Hudson, 49 N.C. App. 457, 271 S.E.2d 560 (1980).

In calculating whether notice of appeal is timely given, the 10th day is not considered if it is a Saturday, Sunday, or legal holiday. In such case, the 10-day period runs at the end of the next day that is not a Saturday, Sunday, or legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

Notice Held Timely. — Notice of appeal filed on July 5, 1983, was timely, where the 10th day fell on Sunday, July 3, 1983, and the next day, July 4, 1983, was a legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

Motion to Appeal in Forma Pauperis. — The late filing of appeal entries had no bearing on the question of the requirement that a motion to appeal in forma pauperis be made within 10 days after the expiration of the session at which judgment is rendered; appeal entries are simply a convenient means of providing a record entry of the fact that an appeal has been taken, and do not constitute the taking of the appeal itself. In re Caldwell, — N.C. App. —, 330 S.E.2d 513 (1985).

Applied in Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977); Harrington v. Harrington, 38 N.C. App. 610, 248 S.E.2d 460 (1978); F. Indus., Inc. v. Cox, 45 N.C. App. 595, 263 S.E.2d 791 (1980); Hamlin v. Austin, 49 N.C. App. 196, 270 S.E.2d 558 (1980); Ramsey v. Rudd, 49 N.C. App. 665, 272 S.E.2d 162 (1980); Byrd v. Byrd, 51 N.C. App. 707, 277 S.E.2d 472 (1981); North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); Henderson v. Provident Life & Accident Ins. Co., 62 N.C. App. 476, 303 S.E.2d 211 (1983); Gates v. Gates, 69 N.C. App. 421, 317

S.E.2d 402 (1984); Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984).

Cited in In re Williamson, 32 N.C. App. 616, 233 S.E.2d 677 (1977); Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843 (1982); Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985); Prevatte v. Prevatte, — N.C. App. —, 329 S.E.2d 413 (1985).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rule 5, Rules of Practice in the Supreme Court of North Carolina.

Docketing Rules Mandatory. — The rule of the Supreme Court requiring the docketing of the appeal within a certain time is mandatory. State v. Farmer, 188 N.C. 243, 124 S.E. 562 (1924); State ex rel. Mills v. National Sur. Co., 192 N.C. 52, 133 S.E. 172 (1926); Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126 (1930).

The rules of the Supreme Court regulating appeals are mandatory. And must be equally observed, or the case will be dismissed. Womble v. Moncure Mill & Gin Co., 194 N.C. 577, 140 S.E. 230 (1927); Covington v. Hanes Hosiery Mills Co., 195 N.C. 478, 142 S.E. 705 (1928); Pentuff v. Park, 195 N.C. 609, 143 S.E. 139 (1928).

The rules may not be disregarded by the legislature, the judge of a superior court, or by litigants or counsel. The Supreme Court has found it necessary to enforce them uniformly. Pentuff v. Park, 195 N.C. 609, 143 S.E. 139 (1928); State v. Walker, 245 N.C. 658, 97 S.E.2d 219 (1957), cert. denied, 356 U.S. 946, 78 S. Ct. 793, 2 L. Ed. 2d 831 (1958).

This rule regulating the time within which appeals must be docketed in the Supreme Court is mandatory and cannot be abrogated by consent or otherwise. Jones v. Jones, 232 N.C. 518, 61 S.E.2d 335 (1950).

When case is not docketed within time prescribed by this rule and no application for writ of certiorari is made, appeal will be dismissed, the rules of practice in the Supreme Court being mandatory and not directory. State v. Presnell, 226 N.C. 160, 36 S.E.2d 927 (1946).

And Dismissal Results Where Agreement of Parties Prohibits Compliance Therewith. — Where the parties agree upon an extension of time for service of case on appeal that will not permit the docketing of the appeal in the Supreme Court in time to be heard according to the procedure in such instances, they knowingly put it beyond their power to comply with the mandatory provisions of this rule, and the case will be dismissed in the Supreme Court when these requirements have not been complied with by the appellant. Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126 (1930).

This rule may not be varied, under agreement with the solicitor or opposing counsel to extend time to the appellant later than that allowed; and when these requirements for any reason cannot be complied with, the appellant must docket the record proper in the Supreme Court, and apply to the court for a certiorari. State v. Trull, 169 N.C. 363, 85 S.E. 133 (1915).

Legislature Cannot Change Rule. — The power of the legislature to permit an extension of the time for settling the case on appeal does not permit it to impinge upon the rule of the Supreme Court requiring the docketing thereof within a prescribed time. State v. Butner, 185 N.C. 731, 117 S.E. 163 (1923).

Nor Can Rule Be Changed by Parties or Trial Judge. — The rules of the Supreme Court regulating the time of docketing appeals are uniformly enforced by the court, without authority to the judges or parties to the action to change them by agreement or otherwise. Rose v. Rocky Mount, 184 N.C. 609, 113 S.E. 506 (1922); Finch v. Commissioners of Nash County, 190 N.C. 154, 129 S.E. 195 (1925); Stone v. Ledbetter, 191 N.C. 777, 133 S.E. 162 (1926).

Failure to Docket. — The motion for a certiorari in the Supreme Court by appellant who has failed to docket his case in time under the requirements of this rule may be allowed, in the discretion of the court, upon the docketing of the record proper and the showing as required for merit and want of laches. State v. Taylor, 194 N.C. 738, 140 S.E. 728 (1927).

Failure to Docket Entire Record. — Though the court, without appellant's fault, fails to settle the case, appellant must within the time allowed by this rule docket all of the record proper, or so much thereof as he can obtain, and file an affidavit as to why the entire record cannot be docketed; otherwise the appeal will be dismissed. Caudle v. Morris, 158 N.C. 594, 74 S.E. 98, modified and aff'd, 160 N.C. 168, 76 S.E. 17 (1912).

Extension of Time Granted for Settling Case on Appeal. — When by consent of the appellant, or by order of the judge, such a long extension of time is granted for settling a case on appeal as to put it beyond the power of appellant to have the case ready for hearing, as required by the rules, the appellant runs the risk of losing his right of appeal. In such instances, unless the appellant gets his appeal docketed in time, as required by the rules of the court, notwithstanding the time allowed, or dockets the record proper and moves for a writ of certiorari, the right of appeal will be lost. State v. Walker, 245 N.C. 658, 97 S.E.2d 219 (1957), cert. denied, 356 U.S. 946, 78 S. Ct. 793, 2 L. Ed. 2d 821 (1958).

Neglect of Counsel. — The negligence of counsel sending up, docketing, and printing the transcript is that of the client. Truelove v. Norris, 152 N.C. 755, 67 S.E. 487 (1910); Howard v. Speight, 180 N.C. 653, 104 S.E. 35 (1920). See also Carroll v. Victory Mfg. Co., 180 N.C. 660, 104 S.E. 528, aff'd, 180 N.C. 366, 104 S.E. 895 (1920); Kear v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

Agreements of Counsel. — The requirement of this rule will be enforced uniformly regardless of an agreement to the contrary that the attorneys for the parties may have made in any particular case. State v. Farmer, 188 N.C. 243, 124 S.E. 562 (1924).

Pending Negotiations for Compromise of Action. — The fact that, on an appeal, negotiations for compromise were pending, is no excuse for failure to docket the appeal. British & Am. Mtg. Co. v. Long, 116 N.C. 77, 20 S.E. 964 (1895).

Filing of Original Papers by Appellant. — Where the appellant fails to file a transcript of the record, but attempts to file the original papers from the trial court, his motion for reinstatement after dismissal of appeal will be denied for laches. Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916).

Transcript Mailed in Reasonable Time. — Where the transcript of a record is deposited in the post office in ample time to reach the Supreme Court within the time required by this rule, but by some delay in the mails does not reach its destination until after the time has expired, the excuse is reasonable, and the appeal will not be dismissed. Walker v. Scott, 104 N.C. 481, 10 S.E. 523 (1889).

Fees Must Be Paid before Transcript Docketed. — The clerk of the Supreme Court is not required to docket a transcript of an appeal before appellant has paid him the required fee therefor. Dunn v. Clerk's Office, 176 N.C. 50, 96 S.E. 738 (1918). But see West v. Reynolds, 94 N.C. 333 (1886). See § 6-33 and notes thereto.

Failure to Pay Costs. — Where a transcript is not sent up in time by reason of the appellant's failure, when notified, to pay costs of the transcript, as he is bound to do, the appellee may move to docket and dismiss the appeal. Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

Delay of Clerk. — Failure to docket the transcript on appeal within the time required by this rule cannot be excused by delay of the clerk, in which case appellant should docket the title of the case with affidavit as to the cause of delay. Carroll v. Victory Mfg. Co., 180 N.C. 660, 104 S.E. 528, aff'd, 180 N.C. 366, 104 S.E. 895 (1920).

It is no sufficient excuse for the appellant's failure to docket his appeal under this rule that the case was delayed in being settled and that the clerk was too busy with a term of court to make out the transcript. Hewitt v. Beck, 152 N.C. 757, 67 S.E. 586 (1910).

The mere fact that appellant tendered payment to the superior court clerk of his fees for transcript on appeal, and the clerk said he would send up the transcript without payment is no sufficient legal excuse for the failure to docket under this rule. Truelove v. Norris, 152 N.C. 755, 67 S.E. 487 (1910).

Case Not Settled. — It is no excuse for failure to docket the appeal that the case was not settled by the judge until too late to docket the case at the proper term, it being appellant's duty to docket the record proper and ask for a writ of certiorari to perfect the transcript. Pittman v. Kimberly, 92 N.C. 562 (1885); State v. Telfair, 139 N.C. 555, 51 S.E. 911 (1905); Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

Renewing of Withdrawn Appeal. — A party to an action has a right to renew his appeal after having once withdrawn it, provided he does so within the time prescribed by the statutes and rules for perfecting appeals. State v. Chastain, 104 N.C. 900, 10 S.E. 519 (1889).

Case Is Dismissed if Moot Question Presented. — Where on appeal it appears that an election sought to be enjoined has already been held, the appeal presents only a moot question, and will be dismissed. Rousseau v. Bullis, 201 N.C. 12, 158 S.E. 553 (1931).

Rule 4

Appeal in Criminal Cases — How and When Taken

(a) **Manner and Time.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 10 days after entry of the judgment or order or within 10 days after a ruling on a motion for

appropriate relief made during the 10-day period following entry of the judgment or order.

(b) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

(d) **To Which Appellate Court Addressed.** An appeal of right from a judgment of a superior court by any person who has been sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other criminal cases such appeals shall be filed in the Court of Appeals. (Amended January 1, 1979; July 13, 1982.)

Drafting Committee Note

Sources and parallels in former rules and statutes: §§ 15-180, 1-279, 1-280.

Commentary.

See the *General Commentary* to Rule 3 which points out the statutory amendments made in conjunction with promulgation of these rules to bring the two into conformity on the procedure for taking appeal from the trial courts.

Subdivision (a) carries forward traditional practice by which in criminal cases (borrowing the code procedure for civil appeals) appeal may be taken either by oral notice given at trial or by written notice within a specified time after judgment. The traditional time of 10 days is also carried forward. Under formerly controlling statutes (§ 1-279, borrowed for criminal appeals by § 15-180) this time commenced to run upon "rendition" of judgment, and by judicial interpretation this event was fixed as the last day of the session at which rendered. This judicial gloss is now incorporated expressly in the Rule to accord with customary practice. (Note that this differs from the starting point for the running of time in civil appeals, which is the date of "entry" of judgment under Rule 58 of the Rules of Civil Procedure. See commentary to subdivision (a) of Rule 3.) Taking appeal, when written rather than oral notice is given, involves both *filing* and *service* of the notice, with service of copies required only upon *adverse* parties. (Note again a difference from the procedure in civil appeals, under which per App. R. 3(a) and (b) service is required upon all *other* parties.) Obviously, when a criminal defendant appeals, there is only one such adverse party, the State. § 1-5. In the infrequent situations in which the State may appeal, § 15-179, if there are multiple defendants, service must be upon all of them. The reasons for not requiring criminal defendants to serve copies upon any co-defendants are: 1) the practical difficulty of doing so in situations of confinement, and 2) the absence of any provision in criminal appeals similar to that in Rule 3(c) for civil appeals which tolls the running of appeal time for all other parties when timely appeal is taken by any party.

Because it is not the practice to enter any judgments or orders from which appeal would lie in a criminal action except during a session of court, this Rule 4 does not contain any provision like that in App. R. 3(b) which provides for appeals in civil actions from judgments rendered out of session. If an appealable judgment or order were to be entered out of session (whether authorized or not), it is obvious that appeal must then be taken by filing and serving written notice.

Subdivision (b). See commentary to subdivision (d) of Rule 3, and Committee Forms 1 and 2.

Subdivision (c). See commentary to subdivision (e) of Rule 3.

Cross References. — As to appeals in criminal actions generally, see § 15A-1441 et seq. and note thereto. As to the appeal bond, see § 1-285 et seq. As to costs on appeal generally, see § 6-33 et seq.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Requirement Where Appellate Review of Criminal Convictions Provided. — While the State has no duty to provide for appellate review of criminal convictions, when it does, it must assure indigent defendants an adequate opportunity to present their claims. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Cited in State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979); State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); State v. Higson, 310 N.C. 418, 312 S.E.2d 437 (1984); State v. Payne, 311 N.C. 291, 316 S.E.2d 64 (1984); State v. Watson, 311 N.C. 252, 316 S.E.2d 293 (1984).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rules 5 and 6, Rules of Practice in the Supreme Court of North Carolina.

Case Subject to Dismissal on Motion or by Court ex Mero Motu. — The defendant not having docketed his case on appeal within the time prescribed by this rule, nor having docketed the record proper and moved for a writ of certiorari before the expiration of time allowed docketing criminal appeals, the case is subject to dismissal either upon motion of the Attorney General or ex mero motu by the court. State v. Walker, 245 N.C. 658, 97 S.E.2d 219 (1957), cert. denied, 356 U.S. 946, 78 S. Ct. 793, 2 L. Ed. 2d 821 (1958).

Appeal Abandoned Where Defendant Breaks Jail. — When the defendant in a criminal action appeals to the Supreme Court, but, pending appeal, breaks jail and flees the jurisdiction of the court, this is an abandonment of the appeal; and, upon motion of the Attorney General, the appeal will be dismissed, or case continued, or judgment affirmed, in the discretion of the court. State v. Keebler, 145 N.C. 560, 59 S.E. 872 (1907).

Rule 5

Joinder of Parties on Appeal

(a) **Appellants.** If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

(b) **Appellees.** Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) **Procedure after Joinder.** After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

Drafting Committee Note

Sources and parallels in rules and statutes: None.

Commentary.

While former statutes and rules obviously contemplated appeals involving multiple parties, and occasionally alluded to the special problems thereby created (as in Sup. Ct. R. 19(2)), they were basically designed to fit the single appellant-single appellee pattern. Specifically, they made no direct provision for joinder on appeal of either appellants or appellees. Since this can be a helpful procedure, this Rule 5 directly authorizes it and lays down quite simple procedures to accomplish joinder. While joinder of appellants will be much more common, appellees may also desire to join on occasion, and subdivision (b) provides for this. The main advantage derived from joinder on either side is reduction in the paper work and effort required, particularly in respect of service of various papers required to be served on all parties. Subdivision (c) cross-refers to a provision in Rule 26, the general filing and service rule, which makes service on any party joined on appeal service on all so joined, thereby insuring this advantage.

Related Rules dealing with other aspects of multiple-party appeals are Rule 11(d) (single record on appeal despite multiple appellants proceeding separately); Rule 26(f) (service on numerous parties proceeding separately); and Rule 11(b) and (c) (procedure for settling record where multiple appellees proceeding separately).

CASE NOTES

Applied in Board of Transp. v. Terminal Whse. Corp., 300 N.C. 700, 268 S.E.2d 180 (1980).

Rule 6

Security for Costs on Appeal

(a) **In Regular Course.** Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.

(b) **In Forma Pauperis Appeals.** An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a certificate of the clerk of the trial tribunal showing cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

(e) **No Security for Costs in Criminal Appeals.** Pursuant to G.S. 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division. (Amended February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: §§ 1-285, 1-286, 1-287, 1-288; Court of Appeals Rule 6(a).

Commentary.

Subdivision (a) simply cross-refers to the statutes which require that ordinarily security for costs be provided as a condition to the right to prosecute an appeal and prescribe the mode of setting and perfecting such security. This basic requirement bears so directly upon the financing of the court system that it seems properly a matter for legislation rather than judicial rule-making as the authoritative source. Cross-reference in these Rules is simply in the interest of the completeness of their coverage of each critical step in the process.

Subdivision (b) similarly cross-refers to the statutory exception to the basic requirement — that of appeals in forma pauperis — and is for the same purpose as stated for subdivision (a).

Subdivision (c) carries forward a requirement of former Court of Appeals Rule 6(a) that the appeal bond be filed *with* the record on appeal. That rule did not, as does this, make alternative provision for filing certificate of the provision of cash deposit in lieu of bond, an alternative clearly permitted by § 1-286.

Subdivision (d) picks up procedures formerly spelled out in §§ 1-285 and 1-287 by which failures properly to provide required security or to file evidence thereof with the record on appeal may be brought to the attention of the appellate court and made the basis of dismissal or of correction. These provisions have been removed from the cited statutes by 1975 amendments on the basis that they pertain more properly to the appellate rule-making power. The substance of these procedures is unchanged, so that no change of established practice is involved. The cross-reference is to the general motion practice rule, Rule 37.

CASE NOTES

Cited in Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

Rule 7

[Reserved]

Editor's Note. — Rule 7 was repealed by amendment effective July 1, 1978, adopted June 19, 1978.

The order repealing this rule provides:

"Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, 'In criminal cases no security for costs is required upon appeal to the appellate division.' Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

"The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

"Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use."

Rule 8

Stay Pending Appeal

(a) When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

(b) **Stay in Criminal Cases.** When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of G.S. 15A-1451. Stays of imprisonment or of the execution of death sentences must be pursued under G.S. 15A-536 or Appellate Rule 23, Writ of Supersedeas. (Amended February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Former Sup. Ct. R. 34(2).

Commentary.

The act of taking appeal in a criminal case automatically stays execution of judgment pending disposition of the appeal. G.S. § 15-184. The situation is not as simple with respect to civil judgments, and this Rule speaks to that situation in order to interrelate the procedures for obtaining stay of execution of such judgments at the trial court level with the supersedeas writ practice by which stay may be obtained from an appellate court under the provisions of App. R. 23.

The procedure for obtaining stays at the trial court level is controlled by N.C.R.Civ.P. 62. That rule contains internal provisions for obtaining stays of some judgments by motion, and cross-refers to certain statutes which provide for automatic stays of other specific judgments by deposit of security in the trial court. The basic thrust of this Rule 8 and the interrelated supersedeas rule, App. R. 23, is to require that, ordinarily, a party must have attempted unsuccessfully to obtain or to hold a stay order at the trial court level under the provisions of N.C.R.Civ.P. 62, before being permitted to seek stay by writ of supersedeas from the appellate court. "Stay order" as used in this rule includes orders which are in effect continuations of injunctive relief which has been vacated by the trial court judgment or order from which appeal has been taken, or which "suspend," pending disposition of an appeal, injunctive relief granted by the judgment or order from which appeal is taken. See N.C.R.Civ.P. 62(c).

CASE NOTES

Cited in In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982).

Rule 9

The Record on Appeal

(a) **Function; Composition of Record.** In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

(i) an index of the contents of the record, which shall appear as the first page thereof;

(ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(iii) a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

(iv) copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

(v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the entire verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

(vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

(vii) copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

(viii) a copy of the judgment, order, or other determination from which appeal is taken;

(ix) a copy of the notice of appeal, or of an appropriate entry showing appeal taken orally, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

(x) copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

(xi) exceptions and assignments of error set out in the manner provided in Rule 10.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

(i) an index of the contents of the record, which shall appear as the first page thereof;

(ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(iii) a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

(iv) copies of all petitions and other pleadings filed in the superior court

(v) copies of all items included in the record of administrative proceedings which were filed in the superior court for review; (formerly (vi))

(vi) so much of the evidence before the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed; (formerly (vii))

(vii) a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken; (formerly (v))

(viii) a copy of the notice of appeal from the superior court, or of an appropriate entry showing appeal taken orally, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

(ix) exceptions and assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:

(i) an index of the contents of the record, which shall appear as the first page thereof;

(ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(iii) copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

(iv) copies of docket entries or a statement showing all arraignments and pleas;

(v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

(vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

(vii) copies of the verdict and of the judgment, order, or other determination from which appeal is taken;

(viii) a copy of the notice of appeal, or of an appropriate entry showing appeal taken orally, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding defendant indigent for the purposes of the appeal and assigning counsel, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

(ix) copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

(x) exceptions and assignments of error set out in the manner provided in Rule 10.

(b) **Form of Record; Amendments.** The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. (formerly (b)(4))

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion. (formerly (b)(5))

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date

on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature. (formerly (c)(3))

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p__). At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal. (formerly (c)(4))

(5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the docketing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal. (formerly (b)(6))

(c) **Presentation of Testimonial Evidence and Other Proceedings.** Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or in the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) **When Testimonial Evidence Narrated — How Set Out in Record.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.** Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire, jury instructions or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned.

(3) **Verbatim Transcript of Proceedings — Settlement, Filing, Copies, Briefs.** Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

(i) it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

(ii) appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed;

(iii) in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

(iv) the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials.** Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(d) **Models, Diagrams, and Exhibits of Material.**

(1) **Exhibits.** Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) **Transmitting Exhibits.** Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) **Removal of Exhibits from Appellate Court.** All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best. (Amended October 1, 1981; March 15, 1982; February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-282, Sup. Ct. (and Ct. App.) Rules 19, 20, 21, 22, 23, 26.

Commentary.

General. This Rule, in subdivision (b), contains a fundamentally new approach to prescribing the composition of the record on appeal. The traditional formula of the code and implementing rules of a "record proper," supplemented where required by a "settled case on appeal," is here abandoned in favor of a detailed enumeration of required items for each of the three types of cases which can be appealed from the trial courts to the appellate courts: civil actions, subd. (b)(1); criminal actions, subd. (b)(2); and appeals from superior court administrative agency reviews, subd. (b)(3). Over the years the practice had already essentially moved around the theoretical code design, as the exact composition of the "record proper" became less and less clear. The device of a specific listing of items is designed to make more certain the process of composing the record on appeal and so to reduce some of the confusion clearly indicated in records and court discussions of imperfectly composed records arising to some extent from the code terminology and its related procedures.

While perhaps obvious, it may be worth emphasizing that although this Rule abandons the distinctive code terminology and some of its related technicalities for composing the record on appeal, it retains the two most fundamental features of the code approach. 1) Use of authenticated copies of trial court record items (plus reporter's transcript), rather than the original trial court papers themselves; and 2) A forced selection of items for inclusion in the record on appeal, rather than using the entire trial court record. This approach continues therefore to be fundamentally distinguished from the "appeal on the original papers" approach now utilized in the federal and some state procedural systems, where the selection process occurs only in the items included in the appendix to the brief. The selection process under this Rule is dictated with respect to enumerated items which may or may not be relevant from case to case, such as jury instructions and other elements of the trial process, by those provisions which admonish inclusion only "when necessary to understand errors assigned." It is in this way that the case-by-case flexibility of composition of the code's "settled case" is carried forward. Counsel should be alert to one fundamental change which this approach involves. Formerly, if appeal could be prosecuted on the "record proper," appellant need not either obtain agreement of appellee nor make service upon him of a "statement of case on appeal," but could merely have the clerk certify the items constituting the "record proper," and docket this as the complete "record on appeal" in the appellate court. See, e.g., *Edwards v. Edwards,* 261 N.C. 445 (1964) (appeal from judgment on the pleadings). Under the new rule, even in such a case he must either obtain agreement of counsel to these items as the "record on appeal" under Rule 11(a), or serve them upon him in a "proposed record on appeal" for acceptance under Rule 11(b) or judicial settlement under Rule 11(c).

While the Rule requires routine inclusion in the record on appeal of all those items which clearly would have been considered parts of the "record proper" under the code (e.g. items iii, iv, vii, viii of subd. (b)(1) for civil appeals), it should be noted that Rule 12(c) provides that even these items may be excluded from those work copies of the formal record on appeal actually prepared by the appellate court clerk for direct consideration by the members of his court. This lays the basis for a two-stage selection process which if carefully followed will produce: 1) an original record on appeal, available for inspection by the court, which is broad enough in scope to allow fair consideration in relevant context of all errors properly to be considered; but 2) "work" copies for individual members of the courts from which have been excluded any formally required items in the original record (such as pleadings, jurisdictional statements or papers) which are not relevant to consideration of particular errors assigned by the parties. Cf. former Sup. Ct. R. 22 and see Commentary to Rule 12(c).

Subdivision (b)(1)-(3). While most of the items enumerated for inclusion in the original records on appeal in these three categories of cases are self-explanatory, it may be helpful to relate some to practice under former statutes and rules.

Item (ii) in subsections (1), (2), (3): "a statement identifying the judge, etc." This is designed to perform the function of the "organization of the court" item indirectly required by former Sup. Ct. R. 22, and traditionally included by counsel in widely varying form in the original record on appeal. The office of this item is simply to permit routine confirmation by the appellate court of the subject matter jurisdiction or "competence" of the particular trial judge and tribunal, whether or not any jurisdictional question has been directly raised by the parties on appeal. See N.C.R.Civ.P. 12(h)(3) (lack of subject matter jurisdiction may be noted by court at any stage of proceedings). The elements enumerated are sufficient for this purpose when rounded out by the court's range of judicial notice. If peripheral questions of "organization" such as the composition of grand or petit jury are to be drawn in question, this should be done by specific assignment of error with relevant parts of the record specially included.

Item (iii) in subsections (1) and (2), "a copy of the summons, etc." This is designed to provide a record showing of the existence of "judicial" jurisdiction of the trial tribunal, whether personal over the defendant, in rem, or quasi in rem, and however based and exercised. Under Code practice it had consistently been understood that the *summons* constituted a part of the "record proper," so must be included in the original record on appeal. *Cressler v. City of Asheville,* 138 N.C. 484 (1905) ("summons, pleading and judgment"). And Sup. Ct. R. 22 built indirectly upon this by providing that the summons so included need not be included in the "printed" copies prepared by the Clerk. Both of these prescriptions, framed in an earlier day of simple process and jurisdiction rules, were too narrowly confined in terms, seemingly only to cases where personal jurisdiction has been acquired by personal service of process. This new Rule speaks more contemporaneously and accurately to the underlying necessity, which is for a record showing of "judicial" jurisdiction, whether over person or property, and whether acquired by service of summons, publication, notice, appearance, waiver, or however.

Item (ix) in subsection (1); (viii) in subsections (2) and (3), "a copy of the notice of appeal, etc." This carries forward existing practice, not formerly required by statute or rule but by judicial decision, e.g., *Atkinson v. Asheville St. Ry.,* 113 N.C. 581 (1893), of including in the record on appeal a showing of appeal properly taken and perfected. This establishes as a matter of record the jurisdiction of the *appellate court* in the particular case. The way in which this has traditionally been shown is by the standardized "appeal entries" which show appeal taken orally "in open court," "further notice waived" (unnecessary), accompanied by any judicial extensions of the statutory times for serving "case" and "counter case," and the amount of appeal bond. This may certainly be continued under this Rule, but the Rule would also be complied with by inclusion of a copy of a written notice of appeal with proof of service under Rule 3(a)(2), or 3(b) and with separate showing of any judicial orders extending times for perfecting appeal. See Committee Form 5, "Appeal Entries."

Subdivision (b)(4). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (b)(5). Former Sup. Ct. R. 26 provided for recovery of the costs of printing records and briefs by the party prevailing, but limited recovery on a maximum page/maximum per page cost basis. This operated indirectly, and in experience not too successfully, as a deterrent to inclusion in the record on appeal of unnecessary matter. Former Sup. Ct. R. 26 and 19(5) also provided a more direct sanction of costs against the party responsible for the inclusion of unnecessary matter in the record on appeal, without regard to outcome of the appeal. This sanction had apparently seldom been invoked. This subdivision of the new rule abandons the page/cost per page limitations on recovery of printing costs by a prevailing party, and retains the sanction of imposing costs of unnecessary portions on the offending party. It has two new features: 1) The sanction is not dependent upon an opposing party's objection, but may be imposed by the court on its own initiative; 2) The costs are chargeable directly against *counsel* as well as a party in the court's discretion.

Subdivision (b)(6). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (c)(1). The problem of incorporating evidence in the record on appeal has two aspects: 1) determining that portion of the total received (or offered) to be included, and 2) the mode of setting out *testimonial* evidence. This subdivision addresses the latter aspect.

The best possible incorporation of testimonial evidence in a record on appeal would 1) include no more than is minimally required for reviewing errors assigned; 2) set out in narrative summary form that which merely lays an undisputed factual context or provides an undisputed factual background; and 3) set out in question-and-answer form all that wherein shades of meaning, nuances of expression, and ambiguity of question or response bear obviously upon the sense and credibility of testimony. An all-narrative summary undoubtedly obscures the true sense of much critical testimony, tends to encourage inclusion of unnecessary portions, and is exceedingly time-consuming. An all-verbatim transcript inevitably includes long passages of confused questions and answers frequently leading finally to the establishment of purely peripheral fact which though necessary as context or background is not really disputed and could be compressed fairly into summary form. Generally speaking, it is obvious that a narrative form is easier for the reviewing court to use, while a verbatim question-and-answer form is easier for counsel to prepare. The problem has been and remains one of accommodation to these conflicting interests and values. This subdivision attempts a new accommodation. Its first sentence continues, for obvious reasons, the traditional requirement that evidence whose admission or exclusion is assigned as error be included in question-and-answer form. The rest of the subdivision involves a limited relaxation of the former flat requirement of narrative form for all other testimonial evidence included. The idea expressed is that this remains the ordinarily preferred and required form, but with the option given to use question-and-answer form where the narrative would obscure particular testimony's true sense. With this option given, it may inevitably become the object of disagreement between counsel during the process of composing the record on appeal. To aid both counsel and any judge required to settle such a dispute as to form, the last paragraph of this subdivision is devoted to a general statement of the considerations properly to be used in determining the fitness of the particular mode in dispute. These are to be brought into play in the normal process, set out in Rule 11, of settling the record — whether by agreement, acceptance through adversarial exchange, or judicial settlement. In this process the appellant will obviously have the first opportunity to choose the form or forms to be used (after having first selected those portions of the total evidence which are to be included in any form). This choice might be exercised informally in a proposal to the appellee for an agreed record on appeal, or in a formal "proposed record on appeal" served upon the appellee. In the latter situation an appellee might either formally object to the proposed form, or include a different form in his "proposed alternative record on appeal." In either case, judicial settlement as to the propriety of the disputed form would then be forced.

Subdivision (c)(2) deals in its two subsections with two different kinds of exhibits which may be required items in the record on appeal. Subsection (i) deals with documentary exhibits (ordinarily will not have been introduced in evidence) which are attached to or are parts of items required to be included in the record on appeal under Rule 9(b) (such as pleadings). On motion these may be excluded as unnecessary to the appeal from the item of which they are a part or to which they are attached, though the item itself must be included in the record on appeal. Subsection (ii) deals with evidentiary exhibits, both documentary and other, which are required items in the record on appeal. If documentary, three copies must be filed with the record. If not documentary only the original, for obvious reasons, need be filed. To protect clerks in their custodial responsibility against the possible loss or damage to such exhibits, G.S. § 7A-106, the rule provides that these may be transmitted directly by the clerk to his appellate court counterpart without relinquishing their custody to counsel.

Subdivision (c)(3). Self-explanatory. From former Sup. Ct. R. 19(1).

Subdivision (c)(4). Self-explanatory. From former Sup. Ct. R. 19(1).

Commentary on 1981 Amendments. — These amendments to Rules 9 and 28 will provide litigants with an *alternative* to the provision of Rule 9(c)(1) which requires that generally the evidence must be set out in narrative form. This alternative pertains only to the testimony given at trial. Other items necessary to the appeal, e.g., pleadings, jury instructions, judgments, etc., should be contained in the record on appeal as required by appropriate appellate rules.

Cross References. — As to exceptions generally, see § 1-186 and notes thereto. As to trial judge being empowered to settle record on appeal, see § 1-283 and notes thereto. As to appeal bond generally, see § 1-285 et seq. As to costs on appeal generally, see § 6-33 et seq.

Editor's note. — The 1984 amendment to this rule, approved November 27, 1984, is applicable to all appeals in which the notice of appeal is filed on or after February 1, 1985.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.
    A. In General.
    B. Assignment of Error.
    C. Composition of Record.
    D. Criminal Actions.
    E. Evidence.

I. IN GENERAL.

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

Where defendant's violations of Rules 9(b)(1) and (c)(1) and 28(b)(5) precluded the possibility of effective appellate review of the questions presented, its appeal would be dismissed. Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984).

An appellate court cannot assume or speculate that there was prejudicial error, when none appears on the record before it. State v. Moore, — N.C. App. —, 331 S.E.2d 251 (1985).

The defendant appellant has the duty to see that the record on appeal is properly made up. State v. McCain, 39 N.C. App. 213, 249 S.E.2d 812 (1978); Tucker v. General Tel. Co., 50 N.C. App. 112, 272 S.E.2d 911 (1980); West v. G.D. Reddick, Inc., 48 N.C. App. 135, 268 S.E.2d 235 (1980), rev'd on other grounds, 302 N.C. 201, 274 S.E.2d 221 (1981); State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

It is the appellant's duty and responsibility to see that the record is in proper form and complete. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

Where the defendant failed to cooperate with the trial court to provide the appellate court with a reconstructed record of the state's closing argument, which the trial court had failed to record, the appellate court was precluded from reviewing the defendant's argument that the state made improper remarks and referred to matters outside the trial record. State v. Moore, — N.C. App. —, 331 S.E.2d 251 (1985).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Appellant's brief is not a part of the record on appeal. West v. G.D. Reddick, Inc., 48 N.C. App. 135, 268 S.E.2d 235 (1980), rev'd on other grounds, 302 N.C. 201, 274 S.E.2d 221 (1981).

Objection When Ruling Made. — Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Waiver of Objections. — Where plaintiffs failed to object at trial to the failure of defendant to state specific grounds for its motion for a directed verdict, plaintiffs, therefore, cannot raise such objection on appeal. Waters v. North Carolina Phosphate Corp., 50 N.C. App. 252, 273 S.E.2d 517, cert. denied, 302 N.C. 402, 279 S.E.2d 357 (1981).

A judgment is a necessary part of the record on appeal of a criminal action. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by § 1-180. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

A reviewing court will not consider alleged errors in selected portions of a charge when the entire charge is not before it. State v. Harrell, 50 N.C. App. 531, 274 S.E.2d 353 (1981); State v. Taylor, 61 N.C. App. 589, 300 S.E.2d 890 (1983).

Where the appellant's narrative summary of the evidence was insufficient to permit the appellate court to determine whether competent evidence supported certain findings of fact, the court would presume that it did. In re Botsford, — N.C. App. —, 330 S.E.2d 23 (1985).

Subdivision (c) provides an alternative to narrating evidence into the record; that is, the filing of a complete stenographic transcript with the clerk of the court in which the appeal is docketed. Whichever method is chosen (Rule 9 or 28), the result must be the same: to-wit, to provide the reviewing court with all the information necessary to understand each question presented. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

Narration of the evidence as specified in subdivision (c) is mandatory. Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977), decided prior to the 1981 amendment which added the third paragraph of subsection (c)(1).

Rule 28(b)(4) serves the same function that subdivision 9(c)(1) of this rule serves with respect to records filed wherein the evidence is narrated; it assures that the court will have before it the evidence necessary to answer the questions presented, and that such evidence is in a condensed and readily available form. State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982).

Rule 28(b)(4) Must Be Followed When Stenographic Transcript Used. — It is imperative that defendants using the stenographic transcript alternative allowed by subdivision (c)(1) of this rule carefully follow the requirements of Rule 28(b)(4) in order that appellate courts not be left the time-consuming and burdensome task of searching through the transcript for the pertinent pages. The omission of the pertinent transcript pages requires that the transcript be circulated among all the judges on the panel, requiring each of them to go through this time-consuming and burdensome task and is grounds for dismissal of the appeal. State v. Wilson, 58 N.C. App. 818, 294 S.E.2d 780 (1982).

When Appendix Required. — An appendix is not contemplated for each question that requires a verbatim reproduction of a part of the transcript in order to understand that question. Instead, subdivision (b)(4) of Rule 28 is designed to ensure that verbatim reproductions appear either in the brief itself or in an appendix to the brief. The appendix method should be employed when the question presented requires long verbatim reproductions of the transcript. Placing such reproductions in an appendix serves the dual purpose of providing the reviewing court with all the information necessary in order to make an informed determination while preserving the clarity and directness of the argument. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

Rule 28 only requires the inclusion of the portions of the transcript necessary to understand, not decide, the question. Any other interpretation would require many appellants, especially those who question the sufficiency of the evidence, to include a verbatim copy of the entire transcript in the appendix to the brief. This interpretation should not encourage appellants to use less than due diligence in following the rules. Indeed, it is usually the safer and wiser course to do more than meet the minimum requirements. State v. Nickerson, 308 N.C. 376, 302 S.E.2d 221 (1983).

Although a complete stenographic transcript contains all the evidence in a case, it is too time consuming and too burdensome a task to expect each member of the reviewing court to search through pages of the transcript in order to find those passages necessary to the understanding of each question presented. Therefore, it is imperative that whenever a stenographic transcript is used in lieu of narrating the evidence into the record, all relevant portions of the transcript must be reproduced in either the brief or its appendix. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

Items Arranged Chronologically. — Each item in the record on appeal should be arranged chronologically, in the same order in which it occurred at trial. State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861, cert. denied, 303 N.C. 183, 280 S.E.2d 455 (1981).

Subdivision (b) (3) (ix) was broadly worded so as to include any proceeding in any court which would be material to the consideration of the case on appeal. If there is a question as to the relevancy of the proceedings from other courts, the parties may settle the dispute according to the procedures provided in Rule 11. The trial judge properly ordered the inclusion of the voir dire of a previous trial into the record. State v. Cumber, 32 N.C. App. 329, 232 S.E.2d 291, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

Counsel's failure to timely file the record on appeal in a criminal prosecution amounted to inadequate assistance of counsel, and the loss of one's only direct appeal because of counsel's neglect constitutes a serious deprivation. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Counsel Taxed with Costs for Filing Redundant Records. — Because counsel representing one codefendant and counsel representing the other defendants filed two records instead of one and because they included unnecessary material in each of the records filed, each counsel will be personally taxed with a portion of the costs. State v. Bryson, 30 N.C. App. 71, 226 S.E.2d 392, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

By appealing the three cases consolidated below separately, counsel has prepared and caused to be printed two redundant records on appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing of three records on appeal instead of one. Consequently, counsel will be personally taxed with costs. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Because of the filing of an unnecessary record on appeal and because unnecessary matter was included in the records filed, counsel for defendants will be personally taxed with a portion of the costs. State v. Ashe, 30 N.C. App. 74, 226 S.E.2d 398 (1976).

It is improper procedure for counsel to file three separate records on appeal from a trial at which the three cases were consolidated. Aside from the question of the unnecessary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Minutes Are Not Substitute for Copy of Judgment. — The "minutes" of the trial court in a criminal action included in the record on appeal are not a substitute for a copy of the judgment. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases or charges and appeal each separately in the absence of a showing of compelling circumstances. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Omission of Necessary Part of Record. — When a necessary part of the record on appeal of a criminal action has been omitted, the appeal will be dismissed. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Record Silent as to Jurisdiction of Lower Court. — When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

Applied in Johnson v. Hooks, 27 N.C. App. 584, 219 S.E.2d 664 (1975); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Montgomery, 291 N.C. 91, 229 S.E.2d 572 (1976); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389 (1976); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394 (1976); Williams v. Williams, 31 N.C. App. 747, 230 S.E.2d 428 (1976); State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); State v. Dixon, 33 N.C. App. 78, 234 S.E.2d 37 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); State v. Spruill, 33 N.C. App. 731, 236 S.E.2d 717 (1977); State v. Hugenberg, 34 N.C. App. 91, 237 S.E.2d 327 (1977); State v. Truzy, 44 N.C. App. 53, 260 S.E.2d 113 (1979); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979); State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980); State v. Trueblood, 46 N.C. App. 545, 265 S.E.2d 664 (1980); Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); State v. Washington, 51 N.C. App. 458, 276 S.E.2d 470 (1981); Burns v. McElroy, 57 N.C. App. 299, 291 S.E.2d 278 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Pearson, 59 N.C. App. 87, 295 S.E.2d 499 (1982); State v. Nickerson, 59 N.C. App. 236, 296 S.E.2d 298 (1982); State v. Edmonds, 59 N.C. App. 359, 296 S.E.2d 802 (1982); State v. Greene, 59 N.C. App. 360, 296 S.E.2d 802 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982); West v. Slick, 60 N.C. App. 345, 299 S.E.2d 657 (1983); State v. Willis, 61 N.C. App. 244, 300 S.E.2d 829 (1983); State v. Monk, 63 N.C. App. 512, 305 S.E.2d 755 (1983); Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983); Hayworth v. Brooks Lumber Co., 65 N.C. App. 555, 309 S.E.2d 572 (1983); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984); State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984); Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 777, 315 S.E.2d 537 (1984); Sessoms v. Sessoms, — N.C. App. —, 332 S.E.2d 511 (1985).

Quoted in Dawkins v. Dawkins, 32 N.C. App. 497, 232 S.E.2d 456 (1977); Wright v. Asheville Pool & Gunite Co., 44 N.C. App. 80, 259 S.E.2d 797 (1979); State v. Jorgenson, 51 N.C. App. 425, 276 S.E.2d 707 (1981).

Stated in Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); State v. Grimes, 47 N.C. App. 476, 267 S.E.2d 387 (1980); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981); State v. Earnhardt, 57 N.C. App. 299, 290 S.E.2d 376 (1982); State v. Nickerson, 62 N.C. App. 754, 303 S.E.2d 569 (1983); Oxendine v. Moss, 64 N.C. App. 205, 306 S.E.2d 831 (1983).

Cited in State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Davis v. Zoning Bd. of Adjustment, 41 N.C. App. 579, 255 S.E.2d 444 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Harvell, 45 N.C. App. 243, 262 S.E.2d 850 (1980); State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980); State v. Jordan, 49 N.C. App. 560, 272 S.E.2d 405 (1980); In re Ford, 49 N.C. App. 674, 272 S.E.2d 157 (1980); State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981); Greensboro-High Point Airport Auth. v. Irvin, 306 N.C. 263, 293 S.E.2d 149 (1982); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); State v. Monroe, 57 N.C. App. 597, 292 S.E.2d 21 (1982); State v. Woodrup, 60 N.C. App. 205, 298 S.E.2d 439 (1982); State v. Proctor, 62 N.C. App. 233, 302 S.E.2d 812 (1983); State v. Sigmon, — N.C. App. —, 328 S.E.2d 843 (1985).

II. DECISIONS UNDER PRIOR LAW.

A. In General.

Editor's Note. — The cases cited below were decided under former Rules 19 and 20, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 19, Rules of Practice in the Court of Appeals of North Carolina.

The purpose of this rule which requires that each assignment of error itself disclose with particularity the specific matters alleged as error without requiring "a voyage of discovery" through an often voluminous record, is twofold: (1) To enable the members of the Supreme Court, in their preargument examination of the record, to ascertain the questions involved in the appeal and thus to obtain maximum benefits from the arguments; (2) to reduce the possibility that an error in the trial below will escape detection. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

The primary purpose of this rule is to save the time of the Supreme Court in reviewing the evidence and to reduce printing costs. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

Rules Mandatory. — This rule and the rule relating to assignments of error and exceptions, are mandatory. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959); Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

This rule is mandatory, and failure to comply limits the appeal to errors presented by the record proper, and in the absence of such error, the appeal will be dismissed. Laughinghouse v. Farm Bureau Mut. Auto. Ins. Co., 239 N.C. 678, 80 S.E.2d 457 (1954); State v. McNeill, 239 N.C. 679, 80 S.E.2d 680 (1954); Whiteside v. Ralston Purina Co., 242 N.C. 591, 89 S.E.2d 159 (1955); State v. Griffin, 246 N.C. 680, 100 S.E.2d 49 (1957); State v. Womack, 251 N.C. 342, 111 S.E.2d 332 (1959); Standard Amusement Co. v. Tarkington, 251 N.C. 461, 111 S.E.2d 538 (1959).

And this rule may not be waived by the parties. Huie v. Templeton, 246 N.C. 86, 97 S.E.2d 455 (1957); State v. Griffin, 246 N.C. 680, 100 S.E.2d 49 (1957); State v. Best, 265 N.C. 477, 144 S.E.2d 416 (1965).

The appellate court is bound by the contents of the record on appeal. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

The record on appeal imports verity. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

The omission of the essential parts of a transcript, as required by this rule, is fatal to the appeal. Allen v. Allen, 235 N.C. 554, 70 S.E.2d 505 (1952).

Impertinent Matter Stricken. — Where "impertinent" matter is introduced into the pleadings, it is, according to the course of the Supreme Court, to be stricken out at the expense of the party introducing it. Powell v. Cobb, 56 N.C. 1 (1856).

No matter is impertinent, however scandalous it may be, or however much it may tend to degrade, provided it bears upon the point about which the parties are at issue. Powell v. Cobb, 56 N.C. 1 (1856).

Exceptions not filed in the record are deemed abandoned. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Record Too Incomplete to Present Constitutional Question. — The Supreme Court will not anticipate questions of constitutional law in advance of the necessity of deciding them, nor will it give advisory opinions on such questions, and where the record in a case on appeal is so incomplete that it may not be determined that the constitutionality of a statute is squarely presented, the questions will not be decided. J.O. Plott Co. v. H.K. Ferguson Constr. Co., 198 N.C. 782, 153 S.E. 396 (1930).

When Party May Amend Pleadings. — The Supreme Court on appeal may allow a party to amend so as to make his pleadings conform to the stipulations of the parties and the theory upon which the case was tried in the lower court, but the Supreme Court will not allow an amendment which would not make the record conform to the facts developed on the trial but would present matter relating to a theory different from that upon which the trial court proceeded. Kayler v. Gallimore, 269 N.C. 405, 152 S.E.2d 518 (1967).

The Supreme Court may in its discretion allow plaintiff to amend his complaint so that the pleadings conform to the proof where it appears that the defendant was not taken by surprise by such proof and that he failed to object to the admission thereof. Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968).

Motion to Reinstate Appeal. — A motion to reinstate a case on appeal that has been dismissed on appellee's motion, for nonconformity with the rules of the court requiring the record to be indexed, and to show the appellant's exceptions under proper assignments of error in accordance with the manner specified, will be denied, when the granting of the motion would not cure the defects. Redding v. Dunn, 185 N.C. 311, 117 S.E. 26 (1923).

Jurisdiction of Trial Court Should Appear. — In order to sustain an appeal to the Supreme Court it is essential that the jurisdiction of the trial court should be made to appear. State v. Patterson, 222 N.C. 179, 22 S.E.2d 267 (1942).

Where the record fails to disclose jurisdiction in the court below, the Supreme Court acquires no jurisdiction by appeal, and the appeal must be dismissed. State v. Banks, 241 N.C. 572, 86 S.E.2d 76 (1955).

Submission of Controversy without Action. — Upon appeal from judgment entered in a submission of controversy without action, the agreed facts with the required affidavits are necessary parts of the record proper. Consolidated Realty Corp. v. Koon, 215 N.C. 459, 2 S.E.2d 360 (1939).

Where two separate actions which cannot be joined in the same action are tried together for convenience but not consolidated by the trial court into one action, separate appeals should be taken and separate records filed by the respective applicants, and this rule is not applicable. Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

Supreme Court May Decide Merits Where Rules Not Followed. — The Supreme Court, in the exercise of its supervisory jurisdiction, may decide questions on the merits even though the procedure prescribed by the rules of practice as necessary to present such questions has not been followed. Eastern Steel Prods. Corp. v. Chestnutt, 252 N.C. 269, 113 S.E.2d 587 (1960).

Although case on appeal was not prepared in accordance with this rule the appeal was allowed, as a dismissal would have been a denial of justice. Messick v. City of Hickory, 211 N.C. 531, 191 S.E. 43 (1937).

Appeal in Forma Pauperis. — That the action is in forma pauperis, does not excuse the appellant in sending up the transcribed stenographer's notes in a voluminous record. Skipper v. Kingsdale Lumber Co., 158 N.C. 322, 74 S.E. 342 (1912).

B. Assignment of Error.

Assignment of Error Necessary. — Appellee's motion to dismiss the appeal will be allowed when the record contains no assignment of error. Hobbs v. Hobbs, 218 N.C. 468, 11 S.E.2d 311 (1940).

Where the record contains no assignments of error, this is ground for dismissal for failure to comply with this rule. Eastern Steel Prods. Corp. v. Chestnutt, 252 N.C. 269, 113 S.E.2d 587 (1960); Williams v. Denning, 260 N.C. 540, 133 S.E.2d 148 (1963).

This rule and Rule 10 require that asserted error must be based on an appropriate exception, and must be properly assigned. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966).

Exceptions Not Set Out Deemed Abandoned. — This rule provides that all exceptions not set out are deemed abandoned. State v. Biggerstaff, 226 N.C. 603, 39 S.E.2d 619 (1946).

Exceptions not brought forward as separate assignments of error and not discussed in the brief are deemed abandoned. Keith v. Wilder, 241 N.C. 672, 86 S.E.2d 444 (1955).

Effect of Absence of Assignments of Error. — Where the record and brief contain no assignments of error as required by this rule, only the face of the record proper is presented for review. Bumgarner & Bowman Bldg., Inc. v. Hollar, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

A sole assignment of error to the signing of a judgment presents the face of the record proper for review, but review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form. In re Morrison, 6 N.C. App. 47, 169 S.E.2d 228 (1969).

Assignment of error must be based upon an exception duly taken, in apt time, during the trial and preserved as required by this rule and Rule 10. State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961).

This rule and Rule 10 require that asserted error must be based on an appropriate exception, and must be properly assigned. These rules of practice in the Supreme Court are mandatory and will be enforced. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

An assignment of error is worthless unless it is based upon an exception duly taken in apt time during the trial and preserved as required by this rule and Rule 10. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Or Judgment Below Will Be Sustained. — Where the case on appeal contains no assignments of error as required by this rule, unless error appears on the face of the record proper, or the issues are insufficient to support the judgment entered, the judgment will be sustained. Anson Bank & Trust Co. v. Henry, 267 N.C. 253, 148 S.E.2d 7 (1966).

In the absence of assignments of error in the record or brief, the judgment below will be sustained in the absence of error appearing on the face of the record proper. State v. Williams, 268 N.C. 295, 150 S.E.2d 447 (1966).

Assignments of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the court should have charged. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

An assignment of error relating to restrictions placed on cross-examination does not comply with this rule and Rule 10 if it does not contain any question put to any witness on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

The questions arising on an appeal are those defined by appropriate exceptions taken by the appellant in the superior court. Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952).

Not Sufficient to Show Exceptions in Record. — This rule is not complied with by showing in the record the various exceptions numbered, but on different pages, when there is no assignment of errors at the end of the case, either before or after the judge's signature; and the appeal will be dismissed. Jones v. Atlantic C.L.R.R., 153 N.C. 419, 69 S.E. 427 (1910). See State v. Biggerstaff, 226 N.C. 603, 39 S.E.2d 619 (1946).

This rule and Rule 10 require an assignment of error to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Assignments Not Supported by Exceptions Therein Noted Will Not Be Considered. — Assignments of error not supported by exceptions therein noted cannot be considered. The Supreme Court will not search through a record in an effort to determine whether or not it contains an exception or exceptions that will sustain the assignments. State v. Worley, 246 N.C. 202, 97 S.E.2d 837 (1957).

The Supreme Court will not consider assignments not based on specific exceptions and which do not comply with its rules. Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962); Corns v. Nickelston, 257 N.C. 277, 125 S.E.2d 588 (1962).

Reason for Requiring Designation of Exceptions. — The reason which requires appellant in the case on appeal to assign or designate the exceptions on which he will rely is apparent. Appellee is entitled to know which of the exceptions taken appellant intends to rely on, so that there may be included in the record such parts as may be necessary to show that there was in fact no error. Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960).

What the Supreme Court requires is that exceptions which are presented to the court for decision shall be stated clearly and intelligibly by the assignment of error, and not by referring to the record, and therewith there shall be set out so much of the evidence or other matter of circumstance as shall be necessary to present clearly the matter to be debated. In this way the scope of inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the court is not sent scurrying through the entire record to find the matters complained of. Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Where the exceptions appear in the record only under the assignments of error, they are ineffectual, since the rules require that assignments of error be based upon exceptions previously noted, and the rules are mandatory and will be enforced ex mero motu. Bulman v. Southern Baptist Convention, 248 N.C. 392, 103 S.E.2d 487 (1958).

Purported exceptions appearing nowhere except in the assignments of error will not be considered on appeal. Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962).

Assignments Must Point Out the Error Relied Upon. — Purported assignments of error will not be considered by the court where they do not throw the slightest light on the questions the court is asked to pass upon. State v. Reel, 254 N.C. 778, 119 S.E.2d 876 (1961).

The error relied upon should be definitely and clearly presented, and the court should not be compelled to go beyond the assignment itself to learn what the question is. Allen v. Allen, 244 N.C. 446, 94 S.E.2d 325 (1956); State v. Mills, 244 N.C. 487, 94 S.E.2d 324 (1956); Tillis v. Calvine Cotton Mills, Inc., 244 N.C. 587, 94 S.E.2d 600 (1956); Armstrong v. Howard, 244 N.C. 598, 94 S.E.2d 594 (1956); Nichols v. McFarland, 249 N.C. 125, 105 S.E.2d 294 (1958); Phillips v. North Carolina R.R., 257 N.C. 239, 125 S.E.2d 603 (1962); Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); State v. Mohrmann, 265 N.C. 594, 144 S.E.2d 645 (1965); State v. Oliver, 268 N.C. 280, 150 S.E.2d 445 (1966).

This rule and Rule 10 require the assignment of error to show what question is intended to be presented for consideration without the necessity of paging through the record to find the asserted error. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. Hunt v. Davis, 248 N.C. 69, 102 S.E.2d 405 (1958); Douglas v. W.C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965).

This rule and Rule 10 require an assignment of error to state clearly and intelligently what question is intended to be presented without the necessity of the court going beyond the assignment of error itself "on a voyage of discovery" through the record to find the asserted error and the precise question involved. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962).

Assignments of error do not comply with the requirements of this rule and are insufficient where they do not present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are, and the particular portions of the charge objected to are not specifically set out. Hill v. Logan, 262 N.C. 488, 137 S.E.2d 822 (1964).

Assignments of error, when properly prepared, pinpoint the controversy. State v. Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

An assignment of error to the admission or exclusion of evidence must include so much of that testimony as will enable the Supreme Court to understand the question sought to be presented without the necessity of going beyond the assignment itself. Grimes v. Home Credit Co., 271 N.C. 608, 157 S.E.2d 213 (1967).

The assignment must be so specific that the court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignments of error which are insufficient to present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are do not comply with this rule. Jones v. Saunders, 257 N.C. 118, 125 S.E.2d 350 (1962); Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966); Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966); State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970).

A mere reference in the assignment of error to the page of the record where the asserted error may be discovered is not a compliance with this rule. Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Lack of Definiteness. — Where the charge covered 36 pages of the record, and all except 15 lines were made the subject of the 72 exceptions taken, and some of the exceptions related to two or more pages of the charge, the exceptions did not point up with the definiteness required by this rule. State v. Stevens, 244 N.C. 40, 92 S.E.2d 409 (1956).

The exceptions which are bona fide shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance as shall be necessary to present clearly the matter to be debated. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Appeal Itself Treated as Exception to Judgment. — Where the exceptions are not grouped, the assignments of error will not be considered, but the appeal itself will be treated as an exception to the judgment. Ellis v. Atlantic C.L.R.R., 241 N.C. 747, 86 S.E.2d 406 (1955).

When Only One Exception Taken. — An appeal will not be dismissed for noncompliance with this rule, requiring all the exceptions relied on to be set out immediately after the statement of the case on appeal, where the appellee was not prejudiced; there being only one exception taken, and that being stated in the record, though improperly. Wall v. Holloman, 156 N.C. 275, 72 S.E. 369 (1911).

When Error Plainly Apparent. — Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied if the error intended to be assigned is plainly apparent. Hicks v. Kenan, 139 N.C. 337, 51 S.E. 941 (1905).

When Only Correctness of Judgment Questioned. — When the appeal calls in question only the correctness of the judgment, no summary of exceptions is required because it is error on the face of the record. Wilson v. Beaufort County Lumber Co., 131 N.C. 163, 42 S.E. 565 (1902); Ullery v. Guthrie, 148 N.C. 417, 62 S.E. 552 (1908).

Discretion of Supreme Court to Dispose of Case. — Where the exceptions are separately numbered and only one of them is necessary to be considered in disposing of the appeal, the Supreme Court in its discretion may dispose of the case on its merits notwithstanding failure of appellant to separately assign the exceptions as error. Aydlett v. Keim, 232 N.C. 367, 61 S.E.2d 109 (1950).

While not in strict compliance with this rule, plaintiff's assignments of error are specific and definite. Since the rules of the Supreme Court are made for the court's convenience and in dispatch of its appellate jurisdiction, the Supreme Court will consider appellant's assignment of error. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

An exception "to each conclusion of law embodied in the judgment" is a broadside exception and does not comply with this rule and § 1-186. Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

An assignment of error which attempts to present several questions of law is broadside and ineffective. State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534, cert. denied, 400 U.S. 946, 91 S. Ct. 253, 27 L. Ed. 2d 252 (1970).

Exception Held Ineffectual. — An exception to the charge on the ground that it "did not give the contentions of the plaintiffs with equal dignity with those of defendant" was ineffectual as a broadside exception in that it failed to point out any particular contention or series of contentions given or omitted by the court as the basis for the exception. Poniors v. Nello L. Teer Co., 236 N.C. 145, 72 S.E.2d 9 (1952).

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966).

C. Composition of Record.

Requirements of Rule Strictly Adhered to. — The requirement that errors relied on be assigned in the record, and that the exceptions relied on shall be grouped, numbered, and set out immediately after the statement of the case on appeal, must be strictly adhered to, except when the appeal is on the ground the judgment was not justified by the facts found or admitted, or that the court did not have jurisdiction. Sigman v. Southern R.R., 135 N.C. 181, 47 S.E. 420 (1904); Pegram v. Hester, 152 N.C. 765, 68 S.E. 8 (1910).

The record on appeal should consist of a

plain, accurate, and concise statement of what the record shows occurred in the trial court, compiled and presented in the order prescribed and pursuant to this rule. State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

The pages of the record in an appeal in forma pauperis must be numbered. Pearce v. Hewitt, 261 N.C. 408, 134 S.E.2d 662 (1964).

The absence of the complaint from the record makes it necessary to dismiss the appeal. Williams v. Asheville Contracting Co., 259 N.C. 232, 130 S.E.2d 340 (1963).

Filing Date of Every Document Required. — This rule requires, inter alia, that the filing date of every pleading, motion, affidavit or other document in the transcript on appeal shall appear. Oliver v. Williams, 266 N.C. 601, 146 S.E.2d 648 (1966).

Causes of Action Must Be Separately Stated. — Where plaintiff brings suit on two causes of action, each must be separately stated. Bannister & Sons v. Williams, 261 N.C. 586, 135 S.E.2d 572 (1964).

Where two or more cases are consolidated and tried together as one case and there are two or more appeals arising from the action, ordinarily only one copy of the record and the proceedings of the trial in the trial tribunal should be filed in the Court of Appeals. State v. Tyler, 4 N.C. App. 682, 167 S.E.2d 509 (1969).

Referring to Prior Paragraphs by Number Insufficient. — A party may not bring forward allegations contained in prior paragraphs of the pleading by referring to such paragraphs by number and stating that pleader repleads them. Wrenn v. Graham, 236 N.C. 719, 74 S.E.2d 232 (1952); Guy v. Baer, 234 N.C. 276, 67 S.E.2d 47 (1951).

Stenographer's Notes. — The stenographer's notes will be of valuable aid to refresh his memory, but the stenographer does not displace the judge in any of his functions. State v. Allen, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographer's notes are not the compelling and supreme authority as to what transpired during the trial. The judge in charging the jury, always tells them that their recollection, and not that of the court itself, must govern them as to what was the testimony of the witnesses. And in settling the cases on appeal the first authority is that of counsel themselves in agreeing as to what occurred at the trial as to the evidence, as to the charge, and otherwise, and when they do not agree the judge must settle what really occurred. State v. Allen, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographic notes will be of great weight with the judge, but are not conclusive if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge who is alone authorized and empowered by the Constitution to try the cause, and who alone if counsel disagree can settle for the court what occurred during the trial. State v. Allen, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographer's Notes Insufficient. — When the appellant has set out in the case on appeal the transcribed stenographer's notes of the trial, he fails to prepare a concise statement of the case as required by this rule, and his appeal will be dismissed, when upon examination no error is found in the record proper. Bucken v. South & W. Ry., 157 N.C. 443, 73 S.E. 137 (1911); Skipper v. Kingsdale Lumber Co., 158 N.C. 322, 74 S.E. 342 (1912).

Only one copy of the stenographic transcript is required to be filed. Bryant v. Snyder, 3 N.C. App. 65, 164 S.E.2d 35 (1968).

A statement of case on appeal is not an essential part of the record on appeal. Moss v. Southern Ry., 2 N.C. App. 50, 162 S.E.2d 633 (1968).

A brief is not a part of the record on appeal. Civil Serv. Bd. v. Page, 2 N.C. App. 34, 162 S.E.2d 644 (1968); Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co., 2 N.C. App. 531, 163 S.E.2d 510 (1968).

Order of Proceedings and Documents. — The record does not comply with this rule where the proceedings are not set forth therein in the order of time in which they occurred and are not arranged so as to follow each other in the order in which they were filed, and the documents included in the record do not plainly show the date on which they were filed. Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Proceedings Not Set Forth in Order of Time. — Where the transcript does not set forth the proceedings in the order of time in which they occur, and the record shows no error warranting an order for a new trial, the appeal will be dismissed on motion. Hobbs v. Cashwell, 158 N.C. 597, 74 S.E. 23 (1912).

An index of exhibits solely by the alphabetical designation of such exhibits does not comply with this rule of practice. Millwood v. Firestone Cotton Mills, 215 N.C. 519, 2 S.E.2d 560 (1939).

Failure to Index. — Appeals will be dismissed where no index is sent up in the record and printed and no marginal references prepared. Sigman v. Southern R.R., 135 N.C. 181, 47 S.E. 420 (1904). See also Alexander v. Alexander, 120 N.C. 472, 27 S.E. 121 (1897); Pretzfelder v. Merchants Ins. Co., 123 N.C. 164, 31 S.E. 470 (1898).

Pleadings, Issues and Judgment Part of Record. — The rules of practice in the Supreme Court require among other things that the pleadings, issues and judgment shall be a part of the record proper, and this appeal, the record not including the summons or complaint, and the court, consequently, not being informed as to the nature of the action, is dis-

missed. Waters v. Waters, 199 N.C. 667, 155 S.E. 564 (1930). See Goodman v. Goodman, 208 N.C. 416, 181 S.E. 328 (1935); Washington County v. Norfolk S. Land Co., 222 N.C. 637, 24 S.E.2d 338 (1943).

The pleadings are an essential part of the record in order that the Supreme Court may be advised as to the nature of the action or proceeding. Allen v. Allen, 235 N.C. 554, 70 S.E.2d 505 (1952).

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. State v. Ravensford Lumber Co., 207 N.C. 47, 175 S.E. 713 (1934); Griffin v. Barnes, 242 N.C. 306, 87 S.E.2d 560 (1955).

Where the pleadings and the referee's report have been omitted from the record, the appeal must be dismissed as not conforming to this rule. Payne v. Brown, 205 N.C. 785, 172 S.E. 348 (1934).

Verified Answer Attached to Motion to Set Aside Default Judgment. — On appeal from an order setting aside a default judgment upon the court's finding of surprise and a meritorious defense, the verified answer of defendant, which was attached to and made a part of the motion to set aside the judgment, is a necessary part of the record proper, and on failure to send it up the appeal will be dismissed, since in the absence of the answer it cannot be determined whether the finding of a meritorious defense was supported by evidence. Mooneyham v. Mooneyham, 249 N.C. 641, 107 S.E.2d 66 (1959).

Copy of Judgment Omitted. — Where on appeal no printed copy of the judgment accompanies the record, the appeal will be dismissed under this rule. Wiley v. Bessemer City Mining Co., 117 N.C. 489, 23 S.E. 448 (1895).

Dismissal of Appeal. — The case on appeal to the Supreme Court will be dismissed when the transcript does not conform to the rules of court regulating appeals. Bridgers v. Griffin, 195 N.C. 862, 142 S.E. 221 (1928); In re Anderson, 251 N.C. 176, 110 S.E.2d 832 (1959).

Under this rule the complaint is a necessary part of the record proper, and when it is not contained therein, the case on appeal will be dismissed. Schwarberg v. Howard, 197 N.C. 126, 147 S.E. 741 (1929); J.O. Plott Co. v. H.K. Ferguson Constr. Co., 198 N.C. 782, 153 S.E. 396 (1930); Thrush v. Thrush, 245 N.C. 63, 94 S.E.2d 897 (1956); Williams v. Asheville Contracting Co., 259 N.C. 232, 130 S.E.2d 340 (1963).

Where on appeal the record contains only a synopsis of the complaint, the appeal will be dismissed. J.O. Plott Co. v. H.K. Ferguson Constr. Co., 198 N.C. 782, 153 S.E. 396 (1930).

Where the record does not show either the organization of the court below or the authority of the special judge who signed the judgment, nor disclose that the judgment was entered at term, the appeal is dismissible under this rule. Vail v. Stone, 222 N.C. 431, 23 S.E.2d 329 (1942).

D. Criminal Actions.

Essential Parts of Transcript in Criminal Cases. — On appeal in criminal cases, the indictment or warrant and plea on which the case is tried, the verdict and the judgment appealed from are essential parts of the transcript. State v. Jenkins, 234 N.C. 112, 66 S.E.2d 819 (1952); State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965).

Where indictments relating to one offense against several defendants are properly consolidated for trial, only one record should be filed on the appeals of defendants. State v. Jackson, 226 N.C. 760, 40 S.E.2d 417 (1946).

Where two defendants are jointly tried for the same offense upon a joint indictment, only a single transcript should be docketed upon their respective appeals. State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966).

Case Decided on False Record. — Where a criminal case is decided in the Supreme Court on a record afterwards found to be false, it will be restored to the docket and a certiorari issued to correct the record. State v. Marsh, 134 N.C. 184, 47 S.E. 6 (1903).

In Capital Case. — Where defendant's exceptions are not brought forward and grouped as required by this rule, the appeal will be dismissed, but where defendant has been convicted of a capital crime this will be done only after an inspection of the record proper and the exceptions fail to disclose prejudicial error. State v. Thompson, 224 N.C. 661, 32 S.E.2d 24 (1944); State v. West, 229 N.C. 416, 50 S.E.2d 3 (1948).

E. Evidence.

Assignments of error as to the admission of evidence shall state with particularity the alleged incompetent evidence, and not require a search through the record to find the challenged evidence. Bridges v. Graham, 246 N.C. 371, 98 S.E.2d 492 (1957).

Failure to State Evidence in Narrative Form. — An appeal is dismissed for failure of the defendants to state the evidence in narrative form. State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Record Not Containing Evidence. — When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Insufficient Statement of Evidence. —

Where it is impossible for the court to determine from whom the evidence was being elicited, who was examining the witnesses, whether there was cross-examination, the purpose for which the witnesses were being examined, and exactly what the evidence was, the recital, rather than being a narration of the evidence, is a recitation of the events surrounding the arrest of the defendants. State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Exclusion of Evidence. — Assignment of error relating to the exclusion of evidence did not comply with this rule in that appellant did not incorporate therein the excluded evidence and thus disclose the alleged error. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

The assignments of error should set forth, within itself, the question asked, the objection, the ruling on the objection, and what the witness would have answered if he had been permitted to testify. Douglas v. W.C. Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965).

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

An assignment of error, unsupported by exception, that the court erred in finding that the evidence was insufficient to sustain appellant's motion, is a broadside exception and ineffectual because of noncompliance with this rule and Rule 10. Columbus County v. Thompson, 249 N.C. 607, 107 S.E.2d 302 (1959).

An assignment of error that the court failed to declare the law arising on the evidence, is a broadside exception and ineffectual. Chalmers v. Womack, 269 N.C. 433, 152 S.E.2d 505 (1967).

When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. State v. Prince, 270 N.C. 769, 154 S.E.2d 897 (1967); State v. Benfield, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Requirements Cannot Be Waived. — The requirements of the rule of the Supreme Court, that the evidence must appear in the case on appeal in narrative form, cannot be waived by the parties. Bucken v. South & W. Ry., 157 N.C. 443, 73 S.E. 137 (1911); First Nat'l Bank v. Fries, 162 N.C. 516, 77 S.E. 678 (1913); State v. McNeill, 239 N.C. 679, 80 S.E.2d 680 (1954); Standard Amusement Co. v. Tarkington, 251 N.C. 461, 111 S.E.2d 538 (1959).

Effect of Failure to Comply. — Where the appellant has failed to make a concise statement of the evidence according to the rules of practice, but gives the entire evidence in the form of questions to and answers of witnesses, taken from the stenographer's notes, the appeal will be dismissed and the judgment affirmed upon motion of the appellee. Casey v. East Carolina Ry., 198 N.C. 432, 152 S.E. 38 (1930); Rhoades v. City of Asheville, 220 N.C. 443, 17 S.E.2d 500 (1941).

An appeal will not be dismissed under this rule, unless the narration of the evidence is fatally defective. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

Where the evidence in the case on appeal is set out entirely in questions and answers instead of in narrative form as required by this rule, the Supreme Court considers only errors presented by the record proper. Anson Bank & Trust Co. v. Henry, 267 N.C. 253, 148 S.E.2d 7 (1966).

Objection to Noncompliance Presented by Counter-Case or Exceptions to Case. — Objection that appellant, instead of reducing the testimony to narrative form as required by this rule, merely gave conclusions as to the meaning of the testimony should ordinarily be presented by counter-case or exceptions to the case on appeal. Keller v. Security Mills of Greensboro, Inc., 260 N.C. 571, 133 S.E.2d 222 (1963).

Filing Copies of Plat. — Where a plat is referred to in the pleadings and evidence, and is necessary to the understanding of an appeal, the same number of copies of the plat must be filed as is required of the printed record and briefs, or the judgment below will be affirmed or appeal dismissed. Stephens v. McDonald, 132 N.C. 135, 43 S.E. 592 (1903).

This is also true of an exhibit made part of the case on appeal. Fleming v. McPhail, 121 N.C. 183, 28 S.E. 258 (1897); Hicks v. Royal, 122 N.C. 405, 29 S.E. 413 (1898).

But where the map or plat is irrelevant its exclusion will not be held error. Fulwood v. Fulwood, 161 N.C. 601, 77 S.E. 763 (1913).

Rule 10

Exceptions and Assignments of Error in Record on Appeal

(a) **Function in Limiting Scope of Review.** Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out in the record on appeal or in the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2), and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) **Exceptions.**

(1) **General.** Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal or in the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and made the basis of an assignment of error. Bills of exception are not required. Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of the grounds or argumentation, by any clear means of reference. Exceptions so set out shall be numbered consecutively in order of their occurrence.

(2) **Jury Instructions; Findings and Conclusions of Judge.** No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury. In the record on appeal an exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

(3) **Sufficiency of the Evidence.** A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) **Assignments of Error — Form.** The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the record pages or transcript pages at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record or transcript of proceedings to which it is directed, a proper listing of the exceptions upon which it is based being sufficient.

(d) **Exceptions and Cross-Assignments of Error by Appellee.** Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2). (Amended October 1, 1981; July 7, 1983; February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-282; Sup. Ct. Rules 19(3) and 21.

Commentary.

General. A necessary feature of any system of appellate procedure which uses a selectively composed record on appeal rather than the entire trial court record is some such sifting process as that embodied in the "exception/assignment of error/questions presented in brief" process brought forward in these rules from code practice. The function and operation of this essential process have been poorly described in former rules and statutes and erratically applied in practice. It is the purpose of this Rule 10 better to describe both intended function and details of operation in an effort to improve practice in this critical area.

Subdivision (a) seeks to express the intended function of this process, and does so in a paraphrase of various formulae used by the courts over the years in their frequently frustrated attempts to police the practice. See, e.g., *State v. Dickman*, 249 N.C. 759 (1959); *Nye v. Devel. Co.*, 10 N.C. App. 676 (1971). The sifting function which is implicit in this statement might be expressed in more specific form as follows. 1) Every judicial action at the trial court level constitutes potentially prejudicial error to the party disfavored by it; hence the total of such actions which disfavor the eventually losing or "aggrieved" party constitute the pool of potentially reversible errors on appeal. 2) But no such error ought be the subject of appellate review unless it has been first suggested to the trial judge in time for him to avoid it or to correct it, or unless it is of such a fundamental nature that no such prior suggestion should be required of counsel. The classic way of making a required suggestion of error in the trial court is by the formal "exception" orally announced, or presented in writing in apt time. Other less formal means of suggesting error may of course be equally effective, so that an "exception" may be "preserved" by them. N.C.R.Civ.P. 46(b) ("formal exceptions … unnecessary"). Other error may be considered of such serious consequence that it requires no suggestion from counsel, and is by law "deemed excepted to." N.C.R.Civ.P. 46(c) (instructions to jury). 3) Whether an exception to it has been actually taken or merely "deemed" taken, the fact that error will be asserted on appeal in respect of particular judicial action must be noted in the record on appeal, first for the benefit of the adverse party, then for the reviewing court. This requires that each such exception be there "set out" in some way which sufficiently identifies the judicial action to which it is addressed. 4) All such exceptions should then be made the basis of formal "assignments of error" in the record on appeal. These constitute in effect the "pleadings" on appeal, for they signal to the adversary the points of law which will be urged on appeal. Each should be confined to a single issue of law, and all exceptions pertinent to this issue should be visibly "grouped" under that assignment of error. This fixes the potential scope of review, and therefore enables the appellee to assess the appropriateness of the record on appeal as proposed by the appellant. 5) From among these "assignments of error" the appellant may choose in the final stage of the sifting process to use all or less than all as the basis for the questions formally to be presented for review in his written brief. These "questions presented" ultimately define the scope of review. Hence the formula: "questions presented must be supported by assignments of error which must be supported by exceptions." Or, obversely: "exceptions not made the basis of assignments of error, and assignments of error not made the basis of questions in the brief, are deemed abandoned." The last sentence proviso expresses the limited exceptions to this basic scheme. The three defects there identified are all of such fundamental significance — going to the jurisdiction of the court and to the question whether the judgment is supportable on the issues before the court — that no exception or assignment of error is required to permit their consideration on appeal. Cf. former Sup. Ct. R. 21 and see *Burroughs v. Realty Co.,* 19 N.C. App. 107 (1973). This subdivision is designed to highlight the underlying purpose behind the exception/assignment of error process in order to make more understandable the desired form and function of the two devices. These are then addressed in the next two subdivisions.

Subdivision (b)(1). The first sentence builds upon the point developed in the commentary to subdivision (a), that only those "exceptions" may be set out in the record on appeal and so made the basis of assignments of error which were taken in the trial court by the classic mode of the spoken or written word "exception"; or "deemed" taken from other conduct, as by objecting to the admission of evidence, N.C.R.Civ.P. 46(a)(2), or from other action plainly indicating opposition to judicial action taken or proposed, N.C.R.Civ.P. 46(b); or "deemed" taken without *any* action by counsel simply because the error is considered sufficiently fundamental, as in instructions to the jury, N.C.R.Civ.P. 46(c).

It is obvious from this that it is rarely the case that an "exception" set out in the record on appeal will necessarily reflect the actual taking of a formal exception at trial. This points to the true, and limited, function of the exception "set out" in the record on appeal: it is merely to provide a visible reference point in the record on appeal for the reviewing court to locate the particular judicial action assigned as error. Recognition of this quite limited function of the exception in the record on appeal explains the next two sentences in the subdivision. By the first, it is provided that a formal "bill of exceptions" need no longer be filed. Without using the exact term, former Sup. Ct. R. 21(c) plainly contemplated the filing of such a "bill" in all situations "when no case settled is necessary", i.e., when the judicial action to be assigned as error occurred with respect to a matter included in the "record proper" — such as the entering of judgment on the pleadings. When formal exception to such action at the trial court level was required in order to "preserve" exception for inclusion in the record on appeal, a written bill filed with the trial court was obviously necessary. Under N.C.R.Civ.P. 46, however, no "formal exception" to such an order is now necessary just so long as counsel resisted allowance of the motion. An exception may now be set out in the record because by this trial rule it is deemed "preserved" by that action. Of course this does not obviate the necessity that there shall have been such a plain indication by counsel of his opposition, and a written "exception" filed with the court would clearly still perform that function, whether denominated a "bill" or not. The next sentence makes plain this limited function by emphasizing that it consists simply of pointing out in the record on appeal the particular judicial action to be assigned as error, and that this does not require any statement of grounds or argumentation. The last sentence of this subsection carries forward traditional practice of consecutive numeration of the exceptions set out in the record on appeal. See Committee Form 6 A-C for illustrative examples.

Subdivision (b)(2) carries forward in its first sentence traditional practice for the clear identification of portions of the judge's charge to which exception is being set out in the record. The second sentence involves a change in the practice recently required by the court for identifying instructions whose *omission* is to be assigned as error. This requirement has been that at least a paraphrase of the instruction which counsel contends should have been given should be set out in brackets following the instructions actually given, with an appropriately numbered exception identifying it. *Duke Power Co. v. Rogers,* 271 N.C. 318, 321 (1967). By this new rule it is sufficient in such case to give the *substance* of the instruction which allegedly should have been given, rather than attempting even to paraphrase the instruction as it is contended the judge should actually have phrased it. See Committee Form 6 D.2. The same requirement is made applicable to the related subject of an exception to the failure to make certain findings of fact or conclusions of law in a non-jury case. The last sentence carries forward an established rule of decision which has prohibited "broadside exceptions" to multiple findings or conclusions. *Logan v. Sprinkle,* 256 N.C. 41 (1961).

Subdivision (c) in its first three sentences restates in condensed form the basic function and desired form of the assignment of error as developed in judicial decisions over the years. As indicated in the general commentary to this Rule, the essential function of this device is to identify for the appellee's benefit all the errors possibly to be urged on appeal, hence the total possible scope of review, so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position on all these points. This being the function, it is sufficient that the assignment of error simply identify without argumentation the basis upon which it is asserted that error was committed, and that it identify, by simply listing ("grouping") them, the various exceptions upon which it is based. The last sentence represents a fundamental change in the required form, as the court in deference to the burden imposed upon counsel abandons the long-standing requirement that each assignment of error contain within itself those portions of the record necessary to its consideration. This rule apparently originated in 1908 in the case of *Thompson v. Railroad,* 147 N.C. 412 (1908) where the Court, faced with a particularly sketchy set of assignments, adopted it in order to avoid the necessity for "making a voyage of discovery" through the record in order to deal with each assignment. This rule has been exceedingly difficult to police consistently, see *Douglas v. Mallison,* 265 N.C. 362 (1965), and *State v. Douglas,* 268 N.C. 267 (1967), and is abandoned in this rule in the hope that counsel will specify the basis of their assignments and identify the exceptions underlying them with sufficient clarity that the Court can fairly and expeditiously consider them as framed. See Committee Form 7 for illustrative examples.

Subdivision (d) introduces a new procedure designed to protect appellees who have been deprived in the trial court of an alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgment was actually based. There has not been a clear-cut procedure of this sort. Such parties may not protect their judgments by becoming cross-appellants, since they are not parties aggrieved under G.S. § 1-271. *Bethea v. Town of Kenly,* 261 N.C. 730 (1964). Nor has there been a general provision by which they might as appellees "conditionally" assign error in the event the appellate court should "aggrieve" them by its decision depriving them of their favorable judgment below. Such a provision has been worked into the aggrieved party statute, G.S. § 1-271, to protect an appellee in the limited situation where as verdict winner below he wishes to argue conditionally on appeal for new trial as opposed to the judgment n.o.v. sought by appellant. It is undoubtedly the case that on occasion the Court has protected an appellee in this situation by drawing on the principle that "review is to correct judgments and not reasons." See, e.g. *Jamerson v. Logan,* 228 N.C. 540 (1948) (though plaintiff appellee's verdict not supportable on issues submitted, case remanded rather than reversed on basis prima facie case well pleaded and proved on theory not submitted to jury). But in such situations, it may well be that the appellant has not been fairly apprised of this possibility and so enabled to meet this conditional position. Both appellees and appellants should be protected in this situation, and this subdivision seeks to provide this protection by allowing an appellee conditionally to present such issues but only on the basis of cross-assignments of error which will have alerted appellant to this possibility and permitted him to protect himself both in terms of composition of the record on appeal and in preparing his brief and oral argument on the "cross-questions." Rule 28(c), which prescribes the contents of briefs, follows up on this by permitting an appellee who has made such cross-assignments of error to present in his brief for appellate review the questions thereby raised. And Rule 16, which deals with review by the Supreme Court or Court of Appeals determinations, ties in by permitting a party who as appellee presented such "cross-questions" in the Court of Appeals to present them for further review in the Supreme Court, whether he appears there as appellant or as appellee.

Commentary on 1981 Amendment. — This amendment will make North Carolina's procedure for reviewing alleged errors in the jury charge similar to that of the federal courts and many, if not most, of the other states including Connecticut, Florida, Indiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas and South Carolina.

Cross References. — As to exceptions generally, see § 1-186 and notes thereto. See also notes to Rule 9.

Editor's Note. — The 1984 amendment to this rule, approved November 27, 1984, is applicable to all appeals in which the notice of appeal is filed on or after February 1, 1985.

Legal Periodicals. —

For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

CASE NOTES

I. In General.
II. Decisions Under Prior Law.
  A. Exceptions.
  B. Evidence.

I. IN GENERAL.

Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Marsico v. Adams, 47 N.C. App. 196, 266 S.E.2d 696 (1980); Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

This rule functions as an important vehicle to insure that errors are not "built into" the record, thereby causing unnecessary appellate review. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

A party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of section (b) of this rule. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Question Must Be Presented on Appeal. — The proviso to subdivision (a) allows review of the questions, without exceptions or assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict and the judgment) but this proviso does not negate the requirement of App. R. 28 that a question must be presented and argued in the brief in order to obtain appellate review of it. State v. Brothers, 33 N.C. App. 233, 234 S.E.2d 652, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977).

A defendant may properly present on appeal the questions in section (a) of this Rule without taking any exceptions or making any assignments of error in the record and may properly present for review the denial of his motion for nonsuit under § 15-173 without making any exception in the record. However, in both these situations, the defendant must still bring those questions forward in his brief, argue them and cite authorities in support of his arguments. Failure to do so means that those questions are not properly presented for review. State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979).

Appellate review depends on specific exceptions and proper assignments of error presented in the record on appeal. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260 (1985).

The assignment of error must clearly disclose the question presented. A single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact is broadside and ineffective. Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260 (1985).

Review Limited to Theories and Constitutional Questions Presented Below. — The theory upon which a case is tried in the lower court must control in constructing the record and determining the validity of the exceptions. Further, a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal. State v. Cooke, 306 N.C. 132, 291 S.E.2d 618 (1982).

When a party fails to raise an appealable issue, the appellate court will generally not

raise it for that party. Harris v. Harris, 307 N.C. 684, 300 S.E.2d 369 (1983).

Only exceptions noted in the record and made the basis for assignments of error will be considered on appeal. State v. Kidd, 60 N.C. App. 140, 298 S.E.2d 406 (1982), cert. denied, 307 N.C. 700, 301 S.E.2d 393 (1983).

A party must, prior to arguing an alleged error in his brief, (a) alert the appellate court that no action was taken by counsel at the trial level, and (b) establish his right to review by asserting in what manner the exception is preserved by rule or law or, when applicable, how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

Waiver by Failure to Present Question on Appeal. — Where the defendant in a murder prosecution did not assign as error on direct appeal the failure of the trial judge in his instructions to place the burden of proving the absence of heat of passion or the absence of self-defense on the State, he waived his right to complain about such errors in post-conviction review. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

Plain Error. — The term "plain error" does not simply mean obvious or apparent error. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983).

In deciding whether a defect in the jury instruction constitutes "plain error," the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983).

The adoption of the "plain error" rule to allow for review of some assignments of error normally barred by waiver rules such as section (b)(2) of this rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate section (b)(2) of this rule which is not the intent or purpose of the "plain error" rule. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983).

The "plain error" rule permits review of a very narrow range of errors notwithstanding a defendant's failure to object at trial to the jury charge. State v. Moore, 311 N.C. 442, 319 S.E.2d 150 (1984).

Plain error must fall within these areas: (1) A fundamental error, meaning something so basic, so prejudicial, so lacking in its elements that justice cannot be done; or (2) a grave error, which must amount to a denial of a fundamental right of the accused; or (3) an error which has resulted in a miscarriage of justice; or (4) an error that denies appellant a fair trial; or (5) an error that seriously affects the fairness, integrity or public reputation of judicial proceedings; or (6) where it can be fairly said that the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. State v. Reilly, 71 N.C. App. 1, 321 S.E.2d 564 (1984), aff'd, 313 N.C. 499, 329 S.E. 2d 381 (1985).

For discussion of "plain error rule," see In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 885 (1984).

The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983); State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131, cert. granted as to additional issues, 312 N.C. 87, 321 S.E.2d 903 (1984); State v. Moore, 311 N.C. 442, 319 S.E.2d 150 (1984).

The purpose of section (b)(2) of this rule is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the "plain error" rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983); State v. Sigmon, — N.C. App. —, 328 S.E.2d 843 (1985).

Subdivision (b)(2) Mandatory. — Subdivision (b)(2) of this rule requiring objection to the charge before the jury retires is mandatory and not merely directory. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982); State v. Sigmon, — N.C. App. —, 328 S.E.2d 843 (1985).

To mitigate the potential harshness of subdivision (b)(2) of this rule, the plain error rule allows the appellate court to cure errors or defects affecting substantial rights which were not brought to the attention of the court below. This rule, however, is always to be applied cautiously and only in the exceptional case where the claimed error is a fundamental error. State v. Oliver, 73 N.C. App. 118, 325 S.E.2d 682 (1985).

Subdivision (b)(2) of this rule has no application once the jury has begun its deliberations. City of Winston-Salem v. Hege, 61 N.C. App. 339, 300 S.E.2d 589 (1983).

Section 15A-1446(d)(13) Abrogated by Subdivision (b)(2). — By enacting subdivision 10(b)(2) of this section, the Supreme Court has by preemption abrogated § 15A-1446(d)(13). State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982), cert. granted, 307 N.C. 469, 299 S.E.2d 222, modified on other grounds, 308 N.C. 530, 302 S.E.2d 786 (1983).

Construction of Subdivision (b)(2) with § 15A-1231. — Subdivision (b)(2) of this rule and § 15A-1231 are in conflict. Subdivision (b)(2) of this rule, however, is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under N.C. Const., Art. IV, § 13(2). Therefore to the extent that § 15A-1231 is inconsistent with subdivision (b)(2) of this rule, the statute must fail. State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983).

Rule 51, Federal Rules of Civil Procedure contains language almost identical to section (b)(2) of this rule. Under Rule 51, no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

Section (b)(2) of this rule and Rule 21 of the Rules of Practice for the Superior and District Courts were designed to prevent unnecessary new trials caused by errors in instructions that the court could have corrected if brought to its attention at the proper time. This policy is met when a request to alter an instruction has been submitted and the trial judge has considered and refused the request. In most instances, it is obvious that further objection at the close of the instructions would be unavailing. Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

A motion for a new trial made under § 1A-1, Rule 59 is a substitute for the obligation of counsel to timely object to the jury instructions. Hanna v. Brady, 73 N.C. App. 521, 327 S.E.2d 22 (1985).

Party may not, after trial and judgment, comb through transcript of proceedings and randomly insert exception notation in disregard of the mandates of section (b) of this rule. State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131, cert. granted as to additional issues, 312 N.C. 87, 321 S.E.2d 903 (1984).

Evidence Incompetent by Statute. — Failure of the trial judge to exclude evidence rendered incompetent by statute is reversible error, whether objection is interposed and exception noted or not. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

Another exception to the waiver rule implicit in subdivision (b) is the admission of evidence contrary to a statute which precludes its admission in furtherance of some public policy of the State. In this instance failure to object to the evidence does not waive one's right to have the error considered on appeal. State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

Discretion of Trial Judge. — A motion to strike out testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal. State v. Hensley, 29 N.C. App. 8, 222 S.E.2d 716, cert. denied, 290 N.C. 95, 225 S.E.2d 325 (1976).

The trial court's findings of fact are deemed to be supported by competent evidence and are conclusive on appeal where defendant does not bring forth in the record any of the testimony or evidence in the case. Bethea v. Bethea, 43 N.C. App. 372, 258 S.E.2d 796 (1979), cert. denied, 299 N.C. 119, 261 S.E.2d 922 (1980).

Failure to Except to Findings of Fact. — When no exceptions are made to the findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

Failure to object to disputed charge during the opportunity provided results in failure to properly preserve the assignment of error for appeal, as required by this rule. State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983).

Findings and Conclusions of Law May Be Challenged for First Time in Brief. — This rule provides that notwithstanding the absence of exceptions, an appeal duly taken from a final judgment may present for review, if properly raised in the brief, the question of whether the judgment is supported by the findings of fact and conclusions of law. Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

Purpose of Section (d). — Section (d) of this rule introduces a new procedure designed to protect appellees who have been deprived in the trial court of an alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgment was actually based. Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); Carawan v. Tate, 304 N.C. 696, 286 S.E.2d 99 (1982).

Failure to object to the introduction of evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal. State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981).

Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review, that is, that an exception, by rule or law was deemed preserved or taken without any such action, or that the alleged error constitutes plain error. State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131, cert. granted as to additional issues, 312 N.C. 87, 321 S.E.2d 903 (1984).

An objection to testimony not taken in apt time is waived. State v. Hensley, 29 N.C. App. 8, 222 S.E.2d 716, cert. denied, 290 N.C. 95, 225 S.E.2d 325 (1976).

Exceptions to improper remarks of counsel during argument to the jury, like those to the admission of incompetent evidence, must be made in apt time or else be lost. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds sub nom. Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L.Ed.2d 69 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Ordinarily, exceptions to improper remarks of counsel during argument must be taken before verdict. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds sub nom. Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L.Ed.2d 69 (1976).

While, ordinarily, failure to object in apt time to incompetent testimony will be regarded as a waiver of objection, and its admission not assignable as error, this rule is subject to an exception where the introduction or use of the evidence is forbidden by statute. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

When there is no objection to an offer of evidence or a motion to strike after its admission, any objection or exception is lost. Unless objection is made at the proper time, it is waived. State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327, cert. denied, 303 N.C. 548, 281 S.E.2d 398 (1981).

Failure to make contemporaneous objection to the jury charge prevents the court from recalling the jury to correct allegedly prejudicial errors; such failure constitutes a waiver of the right to challenge the instructions on appeal. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

Except where the error complained of is so prejudicial that even upon timely objection no purported curative instruction could possibly remove the prejudicial effect, counsel's failure to make timely objection will not waive defendant's right to object under subdivision (b). State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

Or Where Error Violates Defendant's Constitutional Rights. — Where the error violates defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal. State v. Ashe, — N.C. —, 331 S.E.2d 652 (1985).

Or Where Questions of Jurisdiction or Sufficiency of Criminal Charge Are Raised. — Under this rule, upon appeal, any party may present for review, by properly raising the issue in the brief, the questions of whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law. This is true, notwithstanding the absence of exceptions or assignments of error in the record on appeal. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

Under section (a) any party may present for review, by properly raising the issue in his brief, the questions of whether the court had jurisdiction of the subject matter and whether a criminal charge is sufficient in law. This rule applies even when no motion is made to quash. State v. Jones, 36 N.C. App. 263, 243 S.E.2d 827 (1978).

When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial. State v. Ashe, — N.C. —, 331 S.E.2d 652 (1985).

Exceptions or specific assignments of error are not required where the question is whether summary judgment was properly granted. The appeal from the judgment is itself an exception thereto. Vernon, Vernon, Wooten, Brown & Andrews v. Miller, 73 N.C. App. 295, 326 S.E.2d 316 (1985).

A broadside exception presents these questions only: (1) Do the facts found support the judgment, and (2) does error of law appear on the face of the record. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

A broadside exception does not bring up for review the sufficiency of the evidence to support any particular finding of fact. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

Listing of Exceptions. — This rule requires that all assignments of error should be followed by a listing of the exceptions on which they are based, and that these exceptions should be identified by the pages of the record at which they appear; exceptions not listed properly should be deemed abandoned. Peoples Serv. Drug Stores, Inc. v. Mayfair, 50 N.C. App. 442, 274 S.E.2d 365 (1981).

Capital Cases. — In every case where a death sentence has been pronounced, it is the practice of the Supreme Court to carefully review the entire record to determine if prejudicial error appears. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

The general rule that exceptions to improper remarks of counsel during argument must be taken before verdict has been modified so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that the prejudicial effect of such argument could not have been removed from the jurors' minds by any instruction the trial judge might have given. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds sub nom. Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L.Ed.2d 69 (1976).

If after careful review of the entire record in capital cases error does appear, even though not assigned by defendant, the Supreme Court will take cognizance of the error ex mero motu. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

If, upon an examination of the record for the ascertainment of reversible error in capital cases, error is found, it then becomes the duty of the Supreme Court upon its own motion to recognize and act upon the error so found. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

By introducing evidence, defendant waived his motion to dismiss at the close of the state's evidence. State v. Elliott, 68 N.C. App. 89, 316 S.E.2d 632, appeal dismissed, 311 N.C. 765, 321 S.E.2d 148 (1984).

Party may waive statutory or constitutional provisions by express consent or conduct inconsistent with a purpose to insist upon it. As a corollary to this rule, in order for an appellant to assert such right on appeal, the issue must have been presented to the trial court. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

Preservation of Jury Instruction Objections for Review Prior to 1981 Amendment. — See Cole v. Stevenson, 620 F.2d 1055 (4th Cir.), cert. denied, 449 U.S. 1004, 101 S. Ct. 545, 66 L. Ed. 2d 301 (1980), rehearing denied, 449 U.S. 1119, 101 S. Ct. 932, 66 L. Ed. 2d 848 (1981).

This rule requires that party object to the jury charge before the jury retires to consider its verdict. Failure to do so waives any such objection. State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984).

The necessity for identifying the instruction objected to has long been the established practice in North Carolina. The new rules merely clarify the requirement. State v. Snyder, 31 N.C. App. 745, 230 S.E.2d 599, cert. denied, 292 N.C. 268, 233 S.E.2d 395 (1977).

Where the exceptions supporting the assignment of error as to the jury charge refer the court to every transcript page of the jury charge, and defendant fails to clearly identify the objectional portions by setting them within brackets or by any other clear means of reference, the alleged error in the jury charge is not present for consideration on appeal. Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290, cert. denied, 312 N.C. 622, 323 S.E.2d 923 (1984).

And Substance of Inadequacy Must Be Supplied. — Section (b)(2) of this rule means that when an appellant excepts to the inadequacy of the court's instruction on a particular point, in contrast to the court's failure to give any charge on the subject, appellant must set out the substance of the inadequacy, that is, substantially supply the omission which he contends rendered the charge insufficient. State v. Freeman, 295 N.C. 210, 244 S.E.2d 680 (1978).

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by statute. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Record for Review of Sustained Objection. — When an objection to a specific question asked on cross-examination is sustained, the answer the witness would have given must be made part of the record or the propriety of the objection will not be considered on appeal. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980); State v. Wilhite, 59 N.C. App. 654, 294 S.E.2d 396, appeal dismissed and cert. denied, 307 N.C. 129, 297 S.E.2d 403 (1982), rev'd on other grounds, 308 N.C. 798, 303 S.E.2d 788 (1983).

Failure to Except Precludes Review. — The general rule is that where no objection or exception is made at trial to the allegedly improperly admitted evidence, the appellant may not challenge the item for the first time on appeal. State v. Jordan, 49 N.C. App. 561, 272 S.E.2d 405 (1980).

The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal and the lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect. State v. Smith, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

In an action for breach of contract, plaintiff waived its objection to the trial court's framing of an issue submitted to the jury since plaintiff did not object to that issue at trial nor did it request a different issue. Burke County Pub. Schools Bd. of Educ. v. Juno Constr. Corp., 50 N.C. App. 238, 273 S.E.2d 504, cert. withdrawn as improvidently granted, 304 N.C. 187, 282 S.E.2d 778 (1981).

In plaintiff's action for divorce from bed and board on the ground that defendant had rendered such indignities as to make her life burdensome, defendant could not complain on appeal that the issue of plaintiff's indignities offered to defendant should have been submitted to the jury, since defendant never demanded submission of the issue at trial. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243, cert. denied, 302 N.C. 634, 280 S.E.2d 449 (1981).

The plaintiffs, who did not object at trial to the submission of the contributory negligence issue to the jury, could not complain on appeal. Kirk v. R. Stanford Webb Agency, Inc., — N.C. App. —, 330 S.E.2d 262 (1985).

Failure to Except to Jury Instructions. — Defendant waived his right to assign error to certain instructions on appeal where, at trial, before the judge had completed his final instructions to the jury, the judge called the attorneys to the bench and inquired whether either attorney had any further requests, additions, or corrections regarding the instructions to the jury and both attorneys responded negatively, since defense counsel had the opportunity to make an objection out of the hearing of the jury but made no objection at trial. State v. Norfleet, 65 N.C. App. 355, 309 S.E.2d 260 (1983).

Defendants, who failed to object to certain instructions at trial, were barred from raising them on appeal. Lowder v. All Star Mills, Inc., — N.C. App. —, 330 S.E.2d 649 (1985).

It was conclusively presumed that the jury instructions, not objected to by the defendant, conformed to the issues submitted and were without legal error. Dailey v. Integon Gen. Ins. Corp., — N.C. App. —, 331 S.E.2d 148 (1985).

Where a defendant failed to object to an instruction, this rule barred her from assigning error to this portion of the judge's instruction. Penley v. Penley, — N.C. —, 332 S.E.2d 51 (1985).

Same — Law Changed Hours Before Charge. — Although plaintiffs did not object to jury instructions, it was not error for the trial court to grant a new trial on the grounds that the jury had been erroneously charged, where both court and counsel were understandably unaware that the law had changed only hours before the jury was charged. Any objections lodged by the plaintiffs would have been unavailing where the trial judge instructed the jury in accordance with what to him was still established law. Hunnicutt v. Griffin, — N.C. App. —, 332 S.E.2d 525 (1985).

Failure to Except Forecloses State Appeal and Federal Habeas Corpus. — Petitioner's failure to comply with valid state procedural requirements, in that he failed to except to the "presumption of malice" instruction and the alleged burden-shifting instructions in his assignments of error as required by this rule, and failed to otherwise raise the issue in his appeal, foreclosed both direct and collateral attack in the North Carolina courts, and was an adequate and separate state ground for denying federal habeas corpus relief on those claims. Watson v. North Carolina, 509 F. Supp. 850 (E.D.N.C. 1981).

Failure to Raise Standard of Review. — The appellant, having failed to raise the question of the proper standard of judicial review of decisions by the Employment Security Commission at either the administrative level or in the superior court, could not for the first time raise the question in the appellate court. Williams v. Burlington Indus., Inc., — N.C. App. —, 330 S.E.2d 657 (1985).

Where defense counsel submitted written request for particular instructions prior to the jury arguments, which the court denied, defendant was not required by either Rule 10(b)(2) or Rule 21 of the General Rules of Practice for the Superior and District Courts to repeat his objection to the jury instructions, after the fact, in order to properly preserve his exception for appellate review. State v. Smith, 311 N.C. 287, 316 S.E.2d 73 (1984).

In a prosecution for murder the trial court erred in allowing the defendant a new trial on the basis that the retroactivity of the Mullaney rule, see Hankerson v. North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977), was applicable in this case in which the defendant appellant did not object or assign as error on appeal the instructions of the trial court to the jury requiring the defendant to prove the absence of malice or that he acted in self-defense in order to reduce the alleged crime of murder in the second degree to voluntary manslaughter. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

Burden of Establishing Right to Review Where Not Raised at Trial. — Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error. State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983).

The purpose of cross-assignments of error is to allow review of actions or omissions by the trial court which deprive the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal is taken. St. Clair v. Rakestraw, 67 N.C. App. 602, 313 S.E.2d 228 (1984), aff'd in part and rev'd in part, 313 N.C. 171, 326 S.E.2d 19 (1985).

Issue Not Preserved by Cross-Assignment. — Because plaintiff's cross-assignment of error did not present an alternative basis upon which to support the judgment, the question argued therein was not properly before the Court of Appeals; the proper method to have preserved this issue for review would have been a cross-appeal. Stanback v. Westchester Fire Ins. Co., 68 N.C. App. 107, 314 S.E.2d 775 (1984).

Where in her cross-assignments of error the defendant did not contend that the trial court's order deprived her of additional bases supporting the court's order, but rather, that certain portions of the order were erroneous, the proper means by which to raise such an attack would have been an independent appeal, rather than a cross-assignment of error, and defendant's cross-assignments of error were therefore overruled. Whedon v. Whedon, 68 N.C. App. 191, 314 S.E.2d 794 (1984), rev'd on other grounds, 313 N.C. 200, 328 S.E.2d 437 (1985).

Assigning error to the signing of a judgment presents only the question of whether an error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 622, 323 S.E.2d 922 (1984).

Applied in State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); Dawson Indus., Inc. v. Godley Constr. Co., 29 N.C. App. 270, 224 S.E.2d 266 (1976); Foy v. Bremson, 30 N.C. App. 662, 228 S.E.2d 88 (1976); Wycoff v. Pritchard Paint & Glass Co., 31 N.C. App. 246, 229 S.E.2d 47 (1976); Bullard v. North Carolina Nat'l Bank, 31 N.C. App. 312, 229 S.E.2d 245 (1976); Sturdivant v. Sturdivant, 31 N.C. App. 341, 229 S.E.2d 318 (1976); In re Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977); Borg-Warner Acceptance Corp. v. David, 32 N.C. App. 559, 232 S.E.2d 867 (1977); Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977); Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977); Productive Tool Corp. v. Pilot Freight Carriers, Inc., 33 N.C. App. 241, 234 S.E.2d 758 (1977); Moore v. Smith, 33 N.C. App. 275, 235 S.E.2d 102 (1977); State v. Tuttle, 33 N.C. App. 465, 235 S.E.2d 412 (1977); State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); Neasham v. Day, 34 N.C. App. 53, 237 S.E.2d 287 (1977); State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977); Parker v. Williams, 34 N.C. App. 563, 239 S.E.2d 270 (1977); State v. Graham, 35 N.C. App. 700, 242 S.E.2d 512 (1978); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Abernathy, 36 N.C. App. 527, 244 S.E.2d 696 (1978); Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978); Williams v. Dameron, 37 N.C. App. 491, 246 S.E.2d 586 (1978); Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252 (1978); Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); State v. Hodges, 296 N.C. 66, 249 S.E.2d 371 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978); State v. Gibbs, 297 N.C. 410, 255 S.E.2d 168 (1979); State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979); North Carolina Nat'l Bank v. Goode, 298 N.C. 485, 259 S.E.2d 288 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979); Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979); Nicholson v. Hugh Chatham Mem. Hosp., 43 N.C. App. 615, 259 S.E.2d 586 (1979); American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979); State v. Smith, 43 N.C. App. 727, 259 S.E.2d 805 (1979); Shirley v. Administrative Office of Courts, 44 N.C. App. 188, 260 S.E.2d 448 (1979); Patrick v. Mitchell, 44 N.C. App. 357, 260 S.E.2d 809 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980); North Carolina State Bar v. Combs, 44 N.C. App. 447, 261 S.E.2d 207 (1980); Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520 (1980); Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); Thomas v. Deloatch, 45 N.C. App. 322, 263 S.E.2d 615 (1980); Griffin v. Griffin, 45 N.C. App. 531, 263 S.E.2d 39 (1980); Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980); Hazard v. Hazard, 46 N.C. App. 280, 264 S.E.2d 908 (1980); Spartan Equip. Co. v. Troitino & Brown, Inc., 46 N.C. App. 343, 264 S.E.2d 759 (1980); State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980); Heist v. Heist, 46 N.C. App. 521, 265 S.E.2d 434 (1980); State v. Trueblood, 46 N.C. App. 545, 265 S.E.2d 664 (1980); Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); Outer Banks Contractors v. Forbes, 47 N.C. App. 371, 267 S.E.2d 63 (1980); DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980); Thompson v. Lenoir Transf. Co., 48 N.C. App. 47, 268 S.E.2d 534 (1980); Rice v. Peters, 48 N.C. App. 697, 269 S.E.2d

740 (1980); Tan v. Tan, 49 N.C. App. 516, 272 S.E.2d 11 (1980); State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981); In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981); State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981); Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 305 N.C. 633, 291 S.E.2d 137 (1982); State v. Andrews, 306 N.C. 144, 291 S.E.2d 581 (1982); State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982); State v. Mackey, 56 N.C. App. 468, 291 S.E.2d 663 (1982); State v. Best, 59 N.C. App. 96, 295 S.E.2d 774 (1982); State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Crump v. Coffey, 59 N.C. App. 553, 297 S.E.2d 131 (1982); Scott v. Kiker, 59 N.C. App. 458, 297 S.E.2d 142 (1982); State v. Thompson, 59 N.C. App. 425, 297 S.E.2d 177 (1982); State v. Godwin, 59 N.C. App. 662, 297 S.E.2d 623 (1982); State v. Cheek, 307 N.C. 552, 299 S.E.2d 633 (1983); State v. Myrick, 60 N.C. App. 362, 299 S.E.2d 439 (1983); West v. Slick, 60 N.C. App. 345, 299 S.E.2d 657 (1983); State v. Owens, 61 N.C. App. 342, 300 S.E.2d 581 (1983); State v. Capps, 61 N.C. App. 225, 300 S.E.2d 819 (1983); State v. Setzer, 61 N.C. App. 550, 301 S.E.2d 107 (1983); State v. Thompson, 62 N.C. App. 38, 302 S.E.2d 310 (1983); Four Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 302 S.E.2d 848 (1983); State v. Sanderson, 62 N.C. App. 520, 302 S.E.2d 899 (1983); Martin-Kahill Ford Lincoln Mercury, Inc. v. Skidmore, 62 N.C. App. 736, 303 S.E.2d 392 (1983); McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983); State v. Williams, 309 N.C. 170, 305 S.E.2d 519 (1983); In re Ballard, 63 N.C. App. 580, 306 S.E.2d 150 (1983); First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983); State v. Cantrell, 64 N.C. App. 207, 306 S.E.2d 555 (1983); State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983); State v. Jones, 64 N.C. App. 505, 307 S.E.2d 823 (1983); City of Raleigh v. Riley, 64 N.C. App. 623, 308 S.E.2d 464 (1983); State v. Maynard, 65 N.C. App. 81, 308 S.E.2d 665 (1983); State v. Kelley, 65 N.C. App. 519, 308 S.E.2d 720 (1983); State v. Squalls, 65 N.C. App. 599, 309 S.E.2d 558 (1983); Hayworth v. Brooks Lumber Co., 65 N.C. App. 555, 309 S.E.2d 572 (1983); State v. Ingram, 65 N.C. App. 585, 309 S.E.2d 576 (1983); State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983); Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983); State v. Simmons, 65 N.C. App. 804, 310 S.E.2d 139 (1984); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984); State v. Queen, 65 N.C. App. 820, 310 S.E.2d 153 (1984); State v. Bunn, 66 N.C. App. 187, 310 S.E.2d 792 (1984); State v. Haight, 66 N.C. App. 104, 310 S.E.2d 795 (1984); B & H Supply Co. v. Insurance Co. of N. Am., 66 N.C. App. 580, 311 S.E.2d 643 (1984); State v. Cauthen, 66 N.C. App. 630, 311 S.E.2d 649 (1984); State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984); Faught v. Faught, 67 N.C. App. 37, 312 S.E.2d 504 (1984); State v. Bradley, 67 N.C. App. 81, 312 S.E.2d 519 (1984); Housing Auth. v. Clinard, 67 N.C. App. 192, 312 S.E.2d 524 (1984); State v. Byrd, 67 N.C. App. 168, 312 S.E.2d 528 (1984); State v. Joyner, 67 N.C. App. 134, 312 S.E.2d 681 (1984); State v. Williams, 67 N.C. App. 519, 313 S.E.2d 236 (1984); State v. Bennett, 67 N.C. App. 407, 313 S.E.2d 277 (1984); Wachovia Bank & Trust Co. v. Guthrie, 67 N.C. App. 622, 313 S.E.2d 603 (1984); State v. Aldridge, 67 N.C. App. 655, 314 S.E.2d 139 (1984); Texaco, Inc. v. Creel, 310 N.C. 695, 314 S.E.2d 506 (1984); State v. Smith, 311 N.C. 287, 316 S.E.2d 73 (1984); State v. Elliott, 69 N.C. App. 89, 316 S.E.2d 632 (1984); State v. Nelson, 69 N.C. App. 455, 317 S.E.2d 70 (1984); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); State v. Perry, 69 N.C. App. 477, 317 S.E.2d 428 (1984); Smith-Douglass, Div. of Borden Chem., Borden, Inc. v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984); Waynick Constr., Inc. v. York, 70 N.C. App. 287, 319 S.E.2d 304 (1984); Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984); Smith-Douglass, Div. of Borden Chem., Borden, Inc. v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984); Waynick Constr., Inc. v. York, 70 N.C. App. 287, 319 S.E.2d 304 (1984); Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984); State v. Tarrant, 70 N.C. App. 449, 320 S.E.2d 291 (1984); State v. McGinnis, 70 N.C. App. 421, 320 S.E.2d 297 (1984); State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984); State v. Woodruff, 70 N.C. App. 561, 321 S.E.2d 1 (1984); Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984); State v. Bethea, 71 N.C. 125, 321 S.E.2d 520 (1984); State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984); State v. Dorsey, 71 N.C. App. 435, 322 S.E.2d 405 (1984); State v. Goodman, 71 N.C. App. 343, 322 S.E.2d 408 (1984); State v. Southern, 71 N.C. App. 563, 322 S.E.2d 617 (1984); Powe v. Odell, 312 N.C. 410, 322 S.E.2d 762 (1984); Clifford v. River Bend Plantation, Inc., 312 N.C. 460, 323 S.E.2d 23 (1984); State v. Baize, 71 N.C. App. 521, 323 S.E.2d 36 (1984); In re Will of Leonard, 71 N.C. App. 714, 323 S.E.2d 377 (1984); State v. Washington, 71 N.C. App. 767, 323 S.E.2d 420 (1984); Goforth Properties, Inc. v. Town of Chapel Hill, 71 N.C. App. 771, 323 S.E.2d 427 (1984); State v. Upright, 72 N.C. App. 94, 323 S.E.2d 479 (1984); In re Byrd, 72 N.C. App. 277, 324 S.E.2d 273 (1985); Freeman v. St. Paul Fire & Marine Ins. Co., 72 N.C. App. 292, 324 S.E.2d

307 (1985); State v. Joyner, 312 N.C. 779, 324 S.E.2d 841 (1985); State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985); Pittman v. First Protection Life Ins. Co., 72 N.C. App. 428, 325 S.E.2d 287 (1985); State v. Jones, 72 N.C. App. 610, 325 S.E.2d 309 (1985); State v. Hall, 73 N.C. App. 101, 325 S.E.2d 639 (1985); Phillips v. Boling Co., 71 N.C. App. 498, 326 S.E.2d 76 (1985); Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985); State v. Marlowe, 73 N.C. App. 443, 326 S.E.2d 351 (1985); Ferguson v. Croom, 73 N.C. App. 316, 326 S.E.2d 373 (1985); State v. Barranco, 73 N.C. App. 502, 326 S.E.2d 903 (1985); State v. Myers, — N.C. App. —, 327 S.E.2d 276 (1985); Little v. Little, — N.C. App. —, 327 S.E.2d 283 (1985); In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985); State v. Stone, — N.C. App. —, 327 S.E.2d 644 (1985); In re Swisher, — N.C. App. —, 328 S.E.2d 33 (1985); Keene v. Wake County Hosp. Systems, — N.C. App. —, 328 S.E.2d 883 (1985); Watts v. Cumberland County Hosp. Sys., — N.C. App. —, 330 S.E.2d 256 (1985); State v. Austin, — N.C. App. —, 330 S.E.2d 661 (1985); State v. Mason, — N.C. App. —, 331 S.E.2d 767 (1985); Department of Transp. v. Fuller, — N.C. App. —, 332 S.E.2d 87 (1985); State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., — N.C. —, 332 S.E.2d 397 (1985); Cla-Mar Mgt. v. Harris, — N.C. App. —, 332 S.E.2d 495 (1985); Wilkins v. Green, — N.C. App. —, 332 S.E.2d 507 (1985); Sessoms v. Sessoms, — N.C. App. —, 332 S.E.2d 511 (1985); Leary v. Nantahala Power & Light Co., — N.C. App. —, 332 S.E.2d 703 (1985); State v. Arnold, — N.C. —, 333 S.E.2d 34 (1985); Harris v. Walden, — N.C. —, 333 S.E.2d 254 (1985); Knight v. Knight, — N.C. App. —, 333 S.E.2d 331 (1985); State v. Wright, — N.C. App. —, 334 S.E.2d 84 (1985); State v. Green, — N.C. App. —, 334 S.E.2d 263 (1985); McManus v. McManus, — N.C. App. —, 334 S.E.2d 270 (1985).

Quoted in Waters v. Qualified Personnel, Inc., 32 N.C. App. 548, 233 S.E.2d 76 (1977); Sellers v. City of Asheville, 33 N.C. App. 544, 236 S.E.2d 283 (1977); Cole v. Stevenson, 447 F. Supp. 1268 (E.D.N.C. 1978); Norwood v. Sherwin-Williams Co., 303 N.C. 462, 279 S.E.2d 559 (1981); Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880 (1981); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982); State v. Haskins, 60 N.C. App. 199, 298 S.E.2d 188 (1982); Wright v. Fiber Indus., Inc., 60 N.C. App. 486, 299 S.E.2d 284 (1983); Industrial & Textile Piping, Inc. v. Industrial Rigging Servs., Inc., 69 N.C. App. 511, 317 S.E.2d 47 (1984); Durham v. Quincy Mut. Fire Ins. Co., 311 N.C. 361, 317 S.E.2d 372 (1984).

Stated in State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980); F. Indus., Inc. v. Cox, 45 N.C. App. 595, 263 S.E.2d 791 (1980); Harris v. Bridges, 46 N.C. App. 207, 264 S.E.2d 804 (1980); Oroweat Employees Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980); State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980); State v. Stafford, 48 N.C. App. 740, 269 S.E.2d 739 (1980); S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980); State v. Melton, 52 N.C. App. 305, 278 S.E.2d 309 (1981); Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871 (1981); State v. Davis, 64 N.C. App. 186, 306 S.E.2d 829 (1983); Nationwide Mut. Fire Ins. Co. v. Allen, 68 N.C. App. 184, 314 S.E.2d 552 (1984); Cooper v. Federal Reserve Bank, — U.S. —, 104 S. Ct. 2794, — L. Ed. 2d — (1984); Department of Transp. v. Combs, 71 N.C. App. 372, 322 S.E.2d 602 (1984).

Cited in State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); Patterson v. Weatherspoon, 29 N.C. App. 711, 225 S.E.2d 634 (1976); Privette v. Privette, 30 N.C. App. 41, 226 S.E.2d 188 (1976); State v. Willard, 293 N.C. 394, 238 S.E.2d 509 (1977); Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977); Benton v. W.H. Weaver Constr. Co., 34 N.C. App. 421, 238 S.E.2d 655 (1977); State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977); Tadlock v. C.L. Snipes Motors, Inc., 34 N.C. App. 557, 239 S.E.2d 311 (1977); State v. Truesdale, 34 N.C. App. 579, 239 S.E.2d 286 (1977); State v. Collins, 35 N.C. App. 250, 241 S.E.2d 98 (1978); Bridger v. Mangum, 35 N.C. App. 569, 241 S.E.2d 726 (1978); Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978); Greensboro-High Point Airport Auth. v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390 (1978); Lee v. Capitol Tire Co., 40 N.C. App. 150, 252 S.E.2d 252 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Jones v. Morris, 42 N.C. App. 10, 255 S.E.2d 619 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980); Harris v. Harris, 50 N.C. App. 305, 274 S.E.2d 489 (1981); Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897 (1981); Housing, Inc. v. Weaver, 52 N.C. App. 662, 280 S.E.2d 191 (1981); Rheinbert-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981); Young v. Sams, 510 F. Supp. 141 (E.D.N.C. 1981); State v. LeDuc, 306 N.C. 62, 291 S.E.2d 607 (1982); Wachovia Bank & Trust Co. v. Rubish, 306 N.C. 417, 293 S.E.2d 749 (1982); State v. Perkins, 57 N.C. App. 516, 291 S.E.2d 865 (1982); In re Huber, 57 N.C. App. 453, 291 S.E.2d 916 (1982); Powell v. Shull, 58 N.C. App. 68, 293 S.E.2d 259 (1982); State v. Griffin, 308 N.C. 303, 302 S.E.2d 447 (1983);

State v. Courtright, 60 N.C. App. 247, 298 S.E.2d 740 (1983); State v. Sanderson, 60 N.C. App. 604, 300 S.E.2d 9 (1983); First Union Nat'l Bank v. Wilson, 60 N.C. App. 781, 300 S.E.2d 19 (1983); State v. Morrow, 61 N.C. App. 162, 300 S.E.2d 266 (1983); State v. Parker, 61 N.C. App. 94, 300 S.E.2d 451 (1983); Carter v. Parsons, 61 N.C. App. 412, 301 S.E.2d 405 (1983); Wall v. Stout, 61 N.C. App. 576, 301 S.E.2d 467 (1983); State v. Barneycastle, 61 N.C. App. 694, 301 S.E.2d 711 (1983); State v. Housand, 62 N.C. App. 132, 302 S.E.2d 284 (1983); Ransom v. Blair, 62 N.C. App. 71, 302 S.E.2d 306 (1983); North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); Rumley v. Inman, 62 N.C. App. 324, 302 S.E.2d 657 (1983); State v. Proctor, 62 N.C. App. 233, 302 S.E.2d 812 (1983); State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983); State v. Thompson, 64 N.C. App. 354, 307 S.E.2d 397 (1983); Goble v. Helms, 64 N.C. App. 439, 307 S.E.2d 807 (1983); State v. Canty, 309 N.C. 634, 308 S.E.2d 719 (1983); State v. Atkins, 66 N.C. App. 67, 310 S.E.2d 629 (1984); In re Estate of Forrest, 66 N.C. App. 222, 311 S.E.2d 341 (1984); State v. Beasley, 66 N.C. App. 288, 311 S.E.2d 347 (1984); Douglas v. J.C. Penney Co., 67 N.C. App. 344, 313 S.E.2d 176 (1984); Gate City Printing, Inc. v. Glace-Holden, Inc., 67 N.C. App. 546, 313 S.E.2d 209 (1984); In re Barefoot, 67 N.C. App. 712, 313 S.E.2d 924 (1984); Livingston v. City of Charlotte, 68 N.C. App. 265, 314 S.E.2d 303 (1984); Citrini v. Goodwin, 68 N.C. App. 391, 315 S.E.2d 354 (1984); Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984); State v. Rozier, 69 N.C. App. 38, 316 S.E.2d 893 (1984); State v. Welch, 69 N.C. App. 668, 318 S.E.2d 4 (1984); Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984); State v. Bates, 70 N.C. App. 477, 319 S.E.2d 683 (1984); State v. Bates, 70 N.C. App. 477, 319 S.E.2d 683 (1984); State v. Brown, 312 N.C. 237, 321 S.E.2d 856 (1984); Akzona, Inc. v. American Credit Indem. Co., 71 N.C. App. 498, 322 S.E.2d 623 (1984); State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985); Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985); Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985).

II. DECISIONS UNDER PRIOR LAW.

A. Exceptions.

Editor's Note. — The cases cited below were decided under former Rule 21, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 21, Rules of Practice in the Court of Appeals of North Carolina.

Rule Mandatory. — This rule is mandatory. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959); Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963); Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Appeal Dismissed for Failure to Follow Rule. — The court will dismiss the appellant's case when he fails to assign error as required by this rule. Hobbs v. Cashwell, 158 N.C. 597, 74 S.E. 23 (1912); Maddillon Engine & Thresher Co. v. Thomas, 170 N.C. 680, 87 S.E. 327 (1915); In re Bailey, 180 N.C. 30, 103 S.E. 896 (1920).

The appellee's motion to dismiss the appeal because, (1) the exceptions are not "briefly and clearly stated and numbered," (2) the exceptions relied upon are not grouped and numbered immediately after the end of the case on appeal, (3) the index is not placed at the front of the record, will be allowed. Davis v. Wall, 142 N.C. 450, 55 S.E. 350 (1906). See also Jones v. Atlantic C.L.R.R., 153 N.C. 419, 69 S.E. 427 (1910).

Rule Cannot Be Waived. — The rule requiring the assignment of error in the record on appeal is for the benefit of the court, and counsel cannot waive it. Southern Spruce Co. v. Hunnicutt, 166 N.C. 202, 81 S.E. 1079 (1914); Parrott v. Hardesty, 169 N.C. 667, 86 S.E. 582 (1915).

An assignment of error alone will not suffice. — Only an assignment of error bottomed on an exception duly entered in the record will serve to present a question of law for the Supreme Court to decide. State v. Williams, 235 N.C. 429, 70 S.E.2d 1 (1952); Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961); Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961); Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962); Hines v. Frink, 257 N.C. 723, 127 S.E.2d 509 (1962).

An assignment of error must be based on an exception duly noted. State v. Hitchcock, 4 N.C. App. 676, 167 S.E.2d 545 (1969).

Where the exceptions appear in the record only under the assignments of error, they are ineffectual, since the rules require that assignments of error be based upon exceptions previously noted, and the rules are mandatory and will be enforced ex mero motu. Bulman v. Southern Baptist Convention, 248 N.C. 392, 103 S.E.2d 487 (1958).

Assignments of error purporting to be supported by exceptions which appear nowhere in the record except in the purported assignments of error are ineffective and will not be considered on appeal. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962); Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962); Bost v. Citizens Nat'l Bank, 1 N.C. App. 470, 162 S.E.2d 158 (1968); Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

An assignment of error must be based upon an exception duly taken, in apt time, during the trial and preserved as required by this rule and Rule 9. State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961); Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Court Will Not Consider Error Not Subject of Exception or Assignment. — The Court of Appeals will not consider an error in the charge and the evidence which has not been made the subject of an exception or assignment of error. State v. Moore, 6 N.C. App. 596, 170 S.E.2d 568 (1969).

Appellant Must Point Out Error by Exception. — It is the duty of an appellant who asserts prejudicial error to point out the asserted error by exception. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

The exceptions which are bona fide shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance as shall be necessary to present clearly the matter to be debated. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignments of error not supported by exceptions present no question of law for the Supreme Court to decide. Corns v. Nickelston, 257 N.C. 277, 125 S.E.2d 588 (1962).

An exception which is not assigned as error is deemed abandoned. Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962).

Assignment of Error Must Be Clearly Stated. — Assignments of error must be clearly and intelligently stated so that the court will not have to look at exceptions therein referred to in order that they may be understood; for otherwise they will not be considered on appeal. Myrose v. Swain, 172 N.C. 223, 90 S.E. 118 (1916); State v. Burton, 256 N.C. 464, 124 S.E.2d 108 (1962); Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962); Jenks v. Morrison, 258 N.C. 96, 127 S.E.2d 895 (1962); Jones v. Saunders, 257 N.C. 118, 125 S.E.2d 350 (1962); Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962); State v. Mohrmann, 265 N.C. 594, 144 S.E.2d 645 (1965); State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965); State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967); Williams v. Boulerice, 269 N.C. 499, 153 S.E.2d 95 (1967); Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

What the Supreme Court requires is that exceptions which are presented to the court for decision shall be stated clearly and intelligibly by the assignment of error, and not be referring to the record, and therewith there shall be set out so much of the evidence or other matter of circumstance as shall be necessary to present clearly the matter to be debated. In this way the scope of inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the court is not sent scurrying through the entire record to find the matters complained of. Darden v. Bone, 254 N.C. 599, 119 S.E.2d 634 (1961).

Rule 9 and this rule require that asserted error must be based on an appropriate exception, and must be properly assigned. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Assignments of error to a charge which do not set forth the part of the charge challenged do not comply with the rules of practice in the Supreme Court. State v. Dixon, 256 N.C. 698, 124 S.E.2d 821 (1962); Samuel v. Evans, 264 N.C. 393, 141 S.E.2d 627 (1965); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

An exception must point out some specific part of the charge as erroneous. Jenkins v. Gaines, 272 N.C. 81, 157 S.E.2d 669 (1967).

Duty to Prepare Assignment of Error. — The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal; and, if there is an assignment of error not supported by an exception, it will be disregarded. Worley v. Laurel River Logging Co., 157 N.C. 490, 73 S.E. 107 (1911); Allred v. Kirkman, 160 N.C. 392, 76 S.E. 244 (1912); McLeod v. Gooch, 162 N.C. 122, 78 S.E. 4 (1913).

An assignment of error must present a single question of law for consideration by the court. Hines v. Frink, 257 N.C. 723, 127 S.E.2d 509 (1962); State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

An assignment which attempts to raise several different questions is broadside. Hines v. Frink, 257 N.C. 723, 127 S.E.2d 509 (1962).

Broadside Exceptions Ineffectual. — An assignment of error, unsupported by exception, that the court erred in finding that the evidence was insufficient to sustain appellant's motion is a broadside exception and ineffectual because of noncompliance with Rule 9 and this rule. Columbus County v. Thompson, 249 N.C. 607, 107 S.E.2d 302 (1959); Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961); State v. Burrell, 256 N.C. 288, 123 S.E.2d 795, cert. denied, 370 U.S. 961, 82 S. Ct. 1621, 8 L. Ed. 2d 827 (1962); Corns v. Nickelston, 257 N.C. 277, 125 S.E.2d 588 (1962).

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

And may not be aided by the assignment of error. Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961).

Broadside Assignment of Error to Findings of Fact Improper. — Where plaintiff's assignment of error as to the judge's findings of fact was: "For that the judge of the superior court made certain findings of fact, which findings of fact are not supported by the evidence and which findings are contrary to the evidence," it was a broadside assignment of error, which failed to point out or designate in the assignment of error the particular rulings to which exceptions were taken, so that the Supreme Court could see the alleged error made by the judge. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

Exceptions Too General. — Where the plaintiff files a large number of exceptions to the referee's report and the judge confirms or modifies certain portions of the report and sets aside others, an exception, "The plaintiff excepts to such rulings, adverse to it and appeals," is too general to be considered. Commissioners v. Erwin, 140 N.C. 193, 52 S.E. 785 (1905).

Where there is a single assignment of error to several rulings of the trial court, and one of them is correct, the assignment must fail. Buie v. Kennedy, 164 N.C. 290, 80 S.E. 445 (1913).

An exception to a portion of a charge embracing a number of propositions is insufficient if any of the propositions are correct. Clifton v. Turner, 257 N.C. 92, 125 S.E.2d 339 (1962); Jenkins v. Gaines, 272 N.C. 81, 157 S.E.2d 669 (1967).

The questions arising on an appeal are those defined by appropriate exceptions taken by the appellant in the superior court. Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952).

The failure to except leaves nothing to review. State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962).

Scope of Review Where Assignments of Error to Findings of Fact Are Insufficient. — Where the assignments of error are insufficient to present the findings of fact for review, the appeal presents the questions whether the findings support the court's inferences and conclusions of law and judgment, and whether error appears on the face of the record. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

When no exception has been taken to a finding of fact, such finding is presumed to be supported by competent evidence and is binding on appeal. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962).

Appeal Is to Judgment if No Exceptions Preserved. — In the absence of any exceptions, or when exceptions have not been preserved in accordance with the requirements of the rules, the appeal will be taken as an exception to the judgment. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962).

An appeal to the Supreme Court is itself an exception to the judgment or to any other matter of law appearing on the face of the record. Balint v. Grayson, 256 N.C. 490, 124 S.E.2d 364 (1962); State v. Hitchcock, 4 N.C. App. 676, 167 S.E.2d 545 (1969).

The only question raised by an exception to the judgment is whether error of law appears upon the face of the record. Vance v. Hampton, 256 N.C. 557, 124 S.E.2d 527 (1962).

Exceptions Must Be Set Out and Numbered. — Exceptions relied upon in the statement of the case must be set out and numbered. Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955).

Reference by Number Insufficient. — This rule must be complied with to have the appeal considered by the court; and where the assignments of error each simply refers to the exception of record by number, without giving the purport or text thereof, it is insufficient, and the judgment of the trial court will be affirmed. Porter v. American Cigar Box Lumber Co., 164 N.C. 396, 80 S.E. 443 (1913).

A statement purporting to be assignments of error appearing in the record just after the statement of the case on appeal, setting forth in general terms that the appellant excepted to the rulings of the court, as appeared in certain numbered exceptions of record taken on trial, such exceptions themselves not being sufficiently stated, in excluding evidence, and "to a judgment of nonsuit as noted in the forty-seventh exception," is not definite enough for the court to consider on appeal or to be referred to the clerk to be put in the prescribed shape therefor, and the appeal should be dismissed. Thompson v. Seaboard Air Line R.R., 147 N.C. 412, 61 S.E. 286 (1908).

It is entirely proper to group more than one exception under one assignment, when all the exceptions relate to a single question of law. State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

But if Exceptions Relate to Distinct Parts of Charge and Any Part Is Correct, Assignment Fails. — Where there is a single assignment of error based upon several exceptions to several distinct parts of the judge's charge, and one of the parts excepted to is correct, the assignment must fail. State v. Wilson, 264 N.C. 373, 141 S.E.2d 801 (1965).

Reference to Page. — Where the assignments of error are not comprehensive enough to give a clear idea to the court of the matters to be debated without examining the record, they will not be considered, as, "to the question and answer in the admission of the evidence" of a certain witness, "as contained in the exception 1 on page — of the record;" and the giving of proper page will not cure its insufficiency. Rogers v. Jones, 172 N.C. 156, 90 S.E. 117 (1916); Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignments Not Based on Exceptions Considered in Capital Case. — Assignments of error should be based upon exceptions briefly and clearly stated and numbered in the record, but in a capital case, wherein the life of defendant is at stake, assignments of error not so based nevertheless will be considered. State v. Herring, 226 N.C. 213, 37 S.E.2d 319 (1946).

Agreement of Counsel. — Where the record shows that the solicitor agreed that the statement of case on appeal, containing an exception to his argument to the jury and an assignment of error based thereon, should constitute the case on appeal, this is sufficient as an exceptive assignment of error even though defendant made no objection and took no exception at the time. State v. Hawley, 229 N.C. 167, 48 S.E.2d 35 (1948).

An exception to the signing of the judgment presents nothing for review except whether or not the court's conclusion of law is supported by the finding or findings of fact; such exception does not challenge the correctness of any findings of fact. Cratch v. Taylor, 256 N.C. 462, 124 S.E.2d 124 (1962).

Exception to Issues Submitted. — Where a cause was tried under one issue, without exception taken, the assignment of error that other issues should have been submitted is not in compliance with the rules of court regulating appeals. McNairy v. Norfolk & W.R.R., 172 N.C. 505, 90 S.E. 497 (1916).

Questions Discussed in Brief Only. — A question discussed in the brief but not presented by any exception or assignment of error cannot be considered. Coon v. Southern Ry., 171 N.C. 759, 88 S.E. 510 (1916); Needham v. Southern Ry., 171 N.C. 765, 88 S.E. 511 (1916).

When Complaint Does Not State Cause of Action. — A defendant, without filing exception on appeal from an adverse judgment, may move to dismiss the action on the ground that the complaint does not state a cause of action. Lloyd v. North Carolina R.R., 151 N.C. 536, 66 S.E. 604 (1909).

This is not true of an objection for misjoinder of cause of action. Wright v. Kinney, 123 N.C. 618, 31 S.E. 874 (1898).

B. Evidence.

Exceptions to Evidence. — The assignments of error on questions of evidence should set out the testimony so that their relevancy can be seen; and on the rulings of the court or some other matters occurring at the trial, the ruling itself or the attendant facts and circumstances should be so stated that their bearing on the controversy can be perceived to some extent in reading the assignments themselves. Thompson v. Seaboard Air Line R.R., 147 N.C. 412, 61 S.E. 286 (1908); Carter v. Reaves, 167 N.C. 131, 83 S.E. 248 (1914).

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Exception Not Considered Where No Objection or Request Made. — The failure of the court to restrict the admission of testimony competent for the purpose of corroboration is not error where defendant neither objects to the admission of the testimony nor requests that its admission be restricted. State v. Perry, 226 N.C. 530, 39 S.E.2d 460 (1946); Hatcher v. Clayton, 242 N.C. 450, 88 S.E.2d 104 (1955).

The admission of evidence generally and without qualification will not be held erroneous, even though the evidence is competent only for the purpose of corroboration, when at the time of its admission defendant does not request that its purpose be restricted. State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

When it is claimed that findings of fact made by the trial judge are not supported by the evidence, the exceptions and assignments of error in relation thereto must specifically and distinctly point out the alleged errors. Town of Burnsville v. Boone, 231 N.C. 577, 58 S.E.2d 351 (1950); Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

Failure to refer in the charge to the difference between substantive evidence and corroborative evidence and to define each of these terms is not ground for exception. State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958).

An assignment of error relating to restrictions placed on cross-examination does not comply with this rule and Rule 9 if it does not contain any question put to any witness on cross-examination. State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970).

Evidence Competent for Some Purpose. — When evidence is competent for some purpose, its general admission is not reversible error unless the appellant asks at the time of the admission that it be restricted. Tise v. Town of Thomasville, 151 N.C. 281, 65 S.E. 1007 (1909).

A general objection to evidence cannot be sustained if the evidence is competent for any purpose. State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961), cert. denied, 376 U.S. 927, 84 S. Ct. 691, 11 L. Ed. 2d 622 (1964).

Objecting Party to Request Restricted Consideration of Evidence. — When evidence competent for one purpose only and not for another is offered, it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent. State v. Williams, 272 N.C. 273, 158 S.E.2d 85 (1967); State v. Goodson, 273 N.C. 128, 159 S.E.2d 310 (1968).

Ordinarily, where evidence admissible for some purposes, but not for all, is admitted generally, its admission will not be held for error unless the appellant requested at the time of its admission that its purpose be restricted. State v. Corl, 250 N.C. 252, 108 S.E.2d 608 (1959).

When evidence competent for some purposes, but not for all, is admitted generally, unless appellant asks at the time of the admission that its purpose be restricted, or requests special instructions to that effect, the failure of the judge to so restrict it is not assignable for error. Hill v. Bean, 150 N.C. 436, 64 S.E. 212 (1909).

Where evidence, admissible only for the purpose of attacking the credibility of a witness, is admitted generally without objection, there is no error in the court's failure to so restrict its use. State v. McKinnon, 223 N.C. 160, 25 S.E.2d 606 (1943).

Where evidence competent for the purpose of corroboration is admitted generally, and defendant fails at the time of its admission to request that its purpose be restricted, his exception to the admission of the testimony cannot be sustained. State v. Walker, 226 N.C. 458, 38 S.E.2d 531 (1946); Humphries v. Queen City Coach Co., 228 N.C. 399, 45 S.E.2d 546 (1947).

Exception Not Considered. — A witness may testify to statements he had made to the defendant's agent when in corroboration of his testimony; and where the record states that it was confined to that purpose, or there was no request made that it be so confined, it will not be considered as reversible error on appeal. Whitehurst v. Padgett, 157 N.C. 424, 73 S.E. 240 (1911); Perry v. Branning Mfg. Co., 176 N.C. 68, 97 S.E. 162 (1918); Singleton v. Roebuck, 178 N.C. 201, 100 S.E. 313 (1919).

When the evidence is corroborative, the failure of the trial court to restrict it will not be considered on appeal unless the objecting party asks for an instruction to that effect. Chrisco v. Yow, 153 N.C. 434, 69 S.E. 422 (1910); Cooper v. Seaboard Air Line R.R., 163 N.C. 150, 79 S.E. 418 (1913).

Where several witnesses testified to certain facts which the trial judge at the time stated were competent only for the purpose of corroboration, and when charging the jury in reciting the testimony of one of these witnesses he repeated that it was to be considered only for the purpose of corroboration, but failed to do so in reciting the testimony of other witnesses, an exception to such omission cannot be sustained, in the absence of a request to charge that the same rule applied to all of the testimony of that class. Liles v. Lumber Co., 142 N.C. 39, 54 S.E. 795 (1906).

Exceptions to Unanswered Questions. — Where exception is taken to the judge's exclusion of evidence upon the trial, it is upon appellant to show error, and when the exception is taken to unanswered questions, the substance of the answers must be made to appear on appeal, so that the Supreme Court may pass upon its competency. Wallace v. Barlow, 165 N.C. 676, 81 S.E. 924 (1914); Hamlet Ice Co. v. J.A. Jones Constr. Co., 194 N.C. 407, 139 S.E. 771 (1927).

Objection That Instruction Insufficient. — Where the declarations of a party to an action are admissible as to him alone, and the judge has so instructed the jury, an objection that the instruction was not sufficiently definite will not be sustained, unless there was a request to make it so, which was refused. Plemmons v. Murphey, 176 N.C. 671, 97 S.E. 648 (1918).

Unsupported Statements of Appellant. — A statement in the assignments of error, when there is nothing in the statement or record of the case on appeal to give it any support, is only the unsupported statement of the appellant of what had occurred, and hence the assignment of error depending thereon will not be considered on appeal. State v. Freeze, 170 N.C. 710, 86 S.E. 1000 (1915).

Where the charge of the court is not set out in the record on appeal, the presumption is in favor of its correctness, and that the appellant would otherwise have excepted, and especially so when it is stated that the judge charged the jury at length concerning the case. State v. Jones, 182 N.C. 781, 108 S.E. 376 (1921).

Rule 11

Settling the Record on Appeal

(a) **By Agreement.** Within 60 days after appeal is taken, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within 60 days after appeal is taken, file in the office of the clerk of superior court and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 15 days after service of the proposed record on appeal upon him an appellee may file in the office of the clerk of superior court and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Judicial Order or Appellant's Failure to Request Judicial Settlement.** Within 15 days after service upon him of appellant's proposed record on appeal, an appellee may file in the office of the clerk of superior court and serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal.** When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The exceptions and assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c). (Amended February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-282, 1-283, 1-284.

Commentary:

General. Using the change of terminology dictated by abandonment of the "record proper" — "case on appeal" function, see Commentary to Rule 9, this Rule carries forward the developed code process whereby the record on appeal is "settled" for filing in the appellate court — by party agreement, adversary approval through exchanges, or judicial order. The Rule also substantially alters the basic timetable for this process. See Table IV in the Committee's Table of Appendix and Forms. This new timetable attempts to accommodate to the realities of contemporary practice — most importantly, to the time required for securing a reporter's transcript — while nevertheless providing minimal basic times for the critical intervals. These basic intervals may of course then be altered in individual cases by extensions of time upon demonstrated necessity therefor. App. R. 27. This Rule leaves off the total process for perfecting an appeal at the time the record on appeal as settled is presented to the clerk of superior court for certification. The next step — filing the record in the appellate division — is picked up by Rule 12.

Subdivision (a) carries forward traditional practice (not heretofore expressly authorized in statute or rule) by which the parties may of course stipulate their agreement to the composition of a record on appeal. The time limit of 30 days expressed in this subdivision is tied to the basic 30-day period within which, by subdivision (b), an appellant must serve proposed record on appeal, or risk dismissal. These times must be related in order to keep the process moving. But the limit does not prevent later settlement by agreement. Obviously, even after adversarial exchange has begun, the parties should be free at any time to stipulate the record, and this is provided in subdivision (c).

Subdivision (b) describes the opening of the traditional adversarial exchange process, but on an altered basic timetable — 30 days for appellant to serve his proposed record (against 15 days under former G.S. § 1-282), and 15 days for appellee to respond (against 10 days under former G.S. § 1-282). The subdivision concludes on the hypothesis that within the time permitted *all* appellees have either affirmatively approved or failed to make proper objection to the appellant's proposed record, whereupon by force of the rule this becomes the record on appeal. The specification of approval by*all* appellees accommodates to the possibility that in a multiple-appellee situation less than all will so approve by either means. That possibility is dealt with in the next subdivision.

Subdivision (c) picks up the adversarial exchange process at the point where a sole appellee or any one or more of multiple appellees have, within the time permitted them, filed objections or proposed alternative records on appeal (formerly "counter case" per G.S. § 1-283). At this point, any one of three different situations may exist: 1) there is a single appellee in the case; 2) there are multiple appellees, only one of whom files objections or a proposed alternative record; 3) there are multiple appellees, more than one of whom file objections or proposed alternative records. Former statutes dealt only with situation 1); this Rule deals with all three. 1) In the single-appellee situation, failure by the appellant to make timely request for judicial settlement results in settlement in accordance with the appellee's objections or proposed alternative record. Former G.S. § 1-283, which expressly dealt only with the single-appellee hypothesis, gave the same result. 2) Where only one of multiple appellees makes objection or serves proposed alternative record, the Rule permits request for judicial settlement either by appellant or by other appellees, failing which the record on appeal is settled in accordance with the one objecting appellee's objections or proposed alternative record. 3) In the third situation, where more than one of multiple appellees timely object or serve proposed alternative records, again the Rule permits request for judicial settlement either by appellant or any other appellees. But if there is failure by all parties in this situation so to request settlement, an impasse is created which cannot be resolved by dictating settlement in accordance with a single set of objections or alternative record. Here there is inevitably inconsistency or conflict between multiple objections and proposed alternatives. The solution of the Rule is a forced one which impose the penalty for failure to request settlement where it should be, on appellant. The appeal is deemed abandoned by him as to all appellees who did file objections or proposed alternative records. The appeal would stay alive against any approving or non-objecting appellees with the appellant's proposed record on appeal constituting the record. However, if within the time permitted any appellee in this situation requests settlement, the process continues to judicial settlement.

This subdivision also contains alterations in timetables controlling the actions described: 10 days to request settlement, measured from date within which last appellee might have filed objections (against 15 days from date of service of objections under former G.S. § 1-283); 15 days to hold settlement conference, measured from date judge receives request (against 20 days from receipt of request under former G.S. § 1-283).

Subdivision (d) picks up and elaborates upon a provision in former Sup. Ct. R. 19(2) for the composition of a single record on appeal in cases where there are multiple appellants. In any situation where there are both multiple appellants and multiple appellees, the process described in subdivision (c) would be picked up at the point where the multiple appellants had agreed (by whatever procedure) to a single proposed record on appeal, and had served this upon the several appellees.

Subdivision (e). Former G.S. § 1-284, reflecting the two-component record on appeal of code practice, laid upon the clerk of superior court the literal duty to assemble the two (record proper and case on appeal) as soon as the latter was submitted to him in "settled" form, and then to "transmit" the whole to the appellate court clerk duly certified. In this as in other aspects of the practice built around the record proper-case on appeal model, practice had long since moved around design, and the clerk's function had become a much more modest one — of merely certifying the whole "record on appeal" as presented to him. This subdivision conforms to the developed practice, by its terms so confirming the clerk's function, and leaving to the appellant the responsibility for taking the next step — filing the record on appeal in the appellate division in accordance with succeeding Rule 12.

Subdivision (f) is a reminder that all the times provided in this Rule may be extended for cause under the procedures set out in Rule 27.

Editor's Note. — The 1984 amendment to this rule, approved November 27, 1984, is applicable to all appeals in which the notice of appeal is filed on or after February 1, 1985.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

CASE NOTES

Time Schedule. — The time schedule set out in this rule is designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. State v. Gillespie, 31 N.C. App. 520, 230 S.E.2d 154 (1976), cert. denied, 291 N.C. 713, 232 S.E.2d 205 (1977); Ledwell v. County of Randolph, 31 N.C. App. 522, 229 S.E.2d 836 (1976).

The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension. State v. Motsinger, 31 N.C. App. 594, 230 S.E.2d 205 (1976), cert. denied, 291 N.C. 714, 232 S.E.2d 202 (1977); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976).

Record Must Be Settled before Certification. — The clear implication of subdivision (e) of this rule is that the record must be settled before certification. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Court Must Have Certification of Settled Record. — The appellate court must be assured that it has before it the certification of the clerk to the settled record, not the certification of the clerk to a record presented by the appellant. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

The action of the trial judge in settling the record is final and will not be reviewed on appeal. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Court of Appeals Determines Question of Compliance. — Upon appeal, the opinion of Court of Appeals, not the clerk of the superior court, determines whether service of the proposed record was properly made within the required time, whether the record on appeal was properly settled, and whether the record is certified by the clerk of the superior court within ten days after settlement as required by this rule. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

Opposing Counsel of Record under § 122-58.24 (§ 122C-270). — Under § 122-58.24 (see now § 122C-270), the staff attorney of the Attorney General who represents the State at a commitment hearing is the opposing counsel of record within the meaning of Rule 26 and should be served with the proposed record on appeal as required by this rule where the respondent appeals from an order of commitment. And if the State is not the petitioner in the involuntary commitment proceeding, the proposed record on appeal should be served on opposing counsel of record for the petitioner by the respondent appellant. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

Noncompliance Works Loss of Right of Appeal. — A failure by appellant to meet the requirements of section (e) of this rule, or to comply with the mandate of Rule 12(a), works a loss of the right of appeal. Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Failure to Comply Restored Jurisdiction to Trial Court. — Where defendant properly gave notice of appeal on September 1, 1978, but between that date and November 28, 1978, when judgment was entered, a period of 88 days, he took no steps to perfect that appeal, i.e., contrary to the mandate of section (a) of this rule defendant neither tendered a proposed record on appeal within 30 days, nor did he seek any extension of time to settle such a record as permitted by Rule 27(c), defendant's failure to perfect his appeal constituted an abandonment which reinvested the trial court with jurisdiction to render further order in the cause. McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

It is improper procedure for counsel to file three separate records on appeal from a trial at which the three cases were consolidated. Aside from the question of the unnecessary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385 (1976), cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

The filing of two records when there should have been but one and the inclusion in both records of matter which should not have been included has placed an unnecessary burden on this court and has imposed upon the State an expense which was not necessary for the protection of defendants' rights to full appellate review. State v. Bryson, 30 N.C. App. 71, 226 S.E.2d 392, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

Counsel Taxed for Redundant Record. — By appealing the three cases consolidated below separately, counsel has prepared and caused to be printed two redundant records on appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing of three records on appeal instead of one. Consequently, counsel will be personally taxed with costs. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases or charges and appeal each separately in the absence of a showing of compelling circumstances. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Court Presumed to Have Acted Correctly Where Record Silent. — Where the record is silent as to whether a jury instruction conference was in fact held, the defendant must hold himself accountable. The defendant, as appellant, has the duty under this rule to preserve the record on appeal. If there was no instruction conference held, the defendant could have sought a stipulation from the State pursuant to subdivision (a) of this rule acknowledging the trial court's failure in this regard. Had the State refused to agree to the stipulation, and objected to such a notation in the record, then the defendant could have requested that the trial judge settle the record on appeal pursuant to subdivision (c) of this rule. Where the record is silent, it will be presumed that the trial court acted correctly. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Applied in State v. Cottingham, 30 N.C. App. 67, 226 S.E.2d 387 (1976); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389 (1976); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394 (1976); State v. Wilson, 31 N.C. App. 323, 229 S.E.2d 314 (1976); Hudson v. Hudson, 31 N.C. App. 547, 230 S.E.2d 188 (1976); State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31

(1977); Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); Burkhimer v. Coble, 35 N.C. App. 127, 239 S.E.2d 852 (1978); Triplett v. Triplett, 37 N.C. App. 283, 245 S.E.2d 812 (1978); Williams v. Dameron, 37 N.C. App. 491, 246 S.E.2d 586 (1978); State v. Oxendine, 43 N.C. App. 391, 258 S.E.2d 810 (1979); Phillips v. Texfi Indus., Inc., 44 N.C. App. 66, 259 S.E.2d 769 (1979); Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); Vassey v. Burch, 301 N.C. 68, 269 S.E.2d 137 (1980); State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983); Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984).

Stated in John T. Council, Inc. v. Balfour Prods. Group, Inc., — N.C. App. —, 330 S.E.2d 6 (1985).

Cited in State v. Cumber, 32 N.C. App. 329, 232 S.E.2d 291 (1977); State v. Davis, 36 N.C. App. 648, 244 S.E.2d 480 (1978); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984).

Rule 12

Filing the Record; Docketing the Appeal; Copies of the Record

(a) **Time for Filing Record on Appeal.** Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal.** At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) **Copies of Record on Appeal.** The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk. Upon prior agreement with the clerk, the appellant may file with the record on appeal a proposed printed record prepared in accordance with Rule 26 and the appendixes to these rules.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof. (Amended February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-284, Ct. App. R. 3, 5.

Commentary:

Subdivision (a). The 150-day outer limit for filing a record on appeal in the appellate court conforms to the 150-day limit to which, under former rules, time might be extended by a trial tribunal for "docketing" appeal, former Ct.

App. R. 5. The basic time intervals provided by App. R. 11 for perfecting appeal total 90 days to filing in the appellate division (as contrasted with 60 days under former statutes G.S. §§ 1-282, 1-283), thus giving a leeway of 60 days. The 150-day limit may itself be extended on motion, but only by the appropriate *appellate* court. App. R. 27 (c). As indicated in the commentary to App. R. 11, these time limits are intended to accommodate realistically to minimal constraints of contemporary practice.

Subdivision (b). This subdivision differentiates "filing" the record on appeal (a responsibility and function of the appellant) and "docketing" the appeal (a function of the clerk of appellate court). "Docketing" is the critical reference point in time for continuing the timetable for processing appeals (from this is measured the time for filing appellant's brief, App. R. 13), hence the requirement of this subdivision that the clerk give immediate notice to the parties of the date on which this ministerial act has been performed by him.

Subdivision (c). This subdivision continues the developed practice under which the responsibility for preparing printed "work-copies" of the formal record on appeal is routinely placed upon the appellate court clerk. (Cf. former Sup. Ct. Rules 22, 23, and 25, which in terms give an option for prior printing by the appellant.) Hence the provision that only a single copy need be filed. This subdivision also contains the important provision alluded to in the General Commentary to Rule 9 for a further paring down of the "work-copies" from the original record on appeal by stipulation of parties. Cf. former Sup. Ct. R. 22. The mode of reproducing "work-copies" is not specified in this subdivision, in order to accommodate possible alternatives to the mimeographing specified by former rules. This as well as the number of copies is simply left to administrative direction of the particular court to its clerk.

Editor's Note. — The 1984 amendment to this rule, approved November 27, 1984, is applicable to all appeals in which the notice of appeal is filed on or after February 1, 1985.

Legal Periodicals. — For a survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Notice Provision Jurisdictional. — The provisions of this rule, requiring that no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken is jurisdictional and it imposes a limit on the aggrieved party's right to appeal. Only the appropriate appellate court can extend this 150-day time limit. State v. Ward, 61 N.C. App. 747, 301 S.E.2d 507, cert. denied, 309 N.C. 825, 310 S.E.2d 357 (1983).

Counsel's failure to timely file the record on appeal amounted to inadequate assistance of counsel, and the loss of one's only direct appeal because of counsel's neglect constitutes a serious deprivation. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Noncompliance Works Loss of Right of Appeal. — A failure by appellant to meet the requirements of Rule 11(e), or to comply with the mandate of section (a) of this rule, works a loss of the right of appeal. Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Appeal is dismissed where record on appeal was not filed in the appellate court within 150 days from the giving of notice of appeal. Appellant's motion for a new trial or a modification of the judgment pursuant to § 1A-1, Rule 59, the court's order fixing the time for service of the record on appeal, and the court's orders denying appellant's § 1A-1, Rule 59 motion did not extend the time within which the appellant was required to file the record on appeal after giving notice of appeal from the judgment. C.C. Woods Constr. Co. v. Budd- Piper Roofing Co., 46 N.C. App. 634, 265 S.E.2d 506 (1980).

Applied in Boone v. Fuller, 30 N.C. App. 107, 226 S.E.2d 191 (1976); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); Byrd v. Alexander, 32 N.C. App. 782, 233 S.E.2d 654 (1977); State v. Lesley, 33 N.C. App. 237, 234 S.E.2d 476 (1977); Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); City of Hickory v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978); State v. Crouch, 41 N.C. App. 612, 255 S.E.2d 192 (1979); State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); State v. Brown, 43 N.C. App. 532, 259 S.E.2d 309

(1979); In re Farmer, 52 N.C. App. 97, 277 S.E.2d 880 (1981); Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981); Stephenson v. Rowe, 69 N.C. App. 717, 318 S.E.2d 324 (1984).

Quoted in State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980).

Stated in Coleman v. Arnette, 48 N.C. App. 733, 269 S.E.2d 755 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980).

Cited in State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978); Black v. Clark, 36 N.C. App. 191, 243 S.E.2d 808 (1978); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); State v. Locklear, 50 N.C. App. 165, 272 S.E.2d 597 (1980); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982); State v. Bartlett, 64 N.C. App. 388, 307 S.E.2d 178 (1983); Broughton v. North Carolina, 717 F.2d 147 (4th Cir. 1983).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rule 17, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 5, Rules of Practice in the Court of Appeals of North Carolina.

This rule is mandatory, not directory, and must be uniformly enforced. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Rule May Not Be Ignored or Dispensed with. — Neither the judges, nor the solicitors, nor the attorneys, nor the parties have the right to ignore or dispense with the rule requiring docketing within the time prescribed. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Rule Determines Time for Docketing Record on Appeal. — The time for docketing the record on appeal in the Court of Appeals is determined by this rule and should not be confused with the time allowed for serving case on appeal and the time allowed for serving countercase or exceptions. The case on appeal, and the countercase or exceptions, and the settlement of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under this rule. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); Ross v. Sampson, 4 N.C. App. 270, 166 S.E.2d 499 (1969); Reece v. Reece, 6 N.C. App. 606, 170 S.E.2d 546 (1969); State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

The case on appeal, and the countercase or exceptions, and the settlement of the case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under this rule. Rector v. Rector, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

Effect of Noncompliance. — Where defendant fails to docket the record on appeal within the time provided by this rule, the appeal is subject to dismissal. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); State v. Garnett, 4 N.C. App. 367, 167 S.E.2d 63 (1969); State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969); Laws v. Palmer, 4 N.C. App. 510, 167 S.E.2d 49 (1969); North Carolina State Bar v. Temple, 6 N.C. App. 437, 170 S.E.2d 131 (1969), cert. denied, 397 U.S. 1023, 90 S. Ct. 1263, 25 L. Ed. 2d 532, rehearing denied, 397 U.S. 1081, 90 S. Ct. 1520, 25 L. Ed. 2d 820 (1970); Kurtz v. Allstate Ins. Co., 6 N.C. App. 625, 170 S.E.2d 496 (1969); Reece v. Reece, 6 N.C. App. 606, 170 S.E.2d 546 (1969); Dixon v. Dixon, 6 N.C. App. 623, 170 S.E.2d 561 (1969); State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969); Harrell v. Brinson, 7 N.C. App. 197, 171 S.E.2d 798 (1970); State v. Bocage, 8 N.C. App. 64, 173 S.E.2d 638 (1970); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970); State v. Daughtry, 8 N.C. App. 318, 174 S.E.2d 76 (1970); State v. Gibbs, 8 N.C. App. 339, 174 S.E.2d 119 (1970).

Where the record on appeal was docketed in the Court of Appeals after the expiration of the time within which the appeal could be docketed in compliance with this rule, and there was no order extending the time for docketing, the Court of Appeals ex mero motu will dismiss the appeal for failure to comply with the rules. Young v. State Farm Mut. Auto. Ins. Co., 6 N.C. App. 443, 170 S.E.2d 90 (1969).

Failure to Docket. — When the appellant does not docket his appeal before the perusal of the docket of the district to which it belongs, the appellee is entitled, upon motion, to have the appeal docketed and dismissed. Rose v. Shaw, 105 N.C. 126, 10 S.E. 1055 (1890).

It is not discretionary with the Supreme Court to refuse to dismiss an appeal where appellant has failed to docket the case within the time required by this rule, but such refusal can only be based on sufficient legal excuse for the delay. Hewitt v. Beck, 152 N.C. 757, 67 S.E. 586 (1910); Carroll v. Victory Mfg. Co., 180 N.C. 660, 104 S.E. 528, aff'd, 180 N.C. 366, 104 S.E. 895 (1920).

An appeal from the conviction of a capital felony will be docketed and dismissed on motion of the Attorney General when not prosecuted as required by the rules of the Supreme Court regulating such matters, after an examination of the record of errors appearing on its face. State v. Taylor, 194 N.C. 738, 140 S.E.

728 (1927); State v. Thomas, 195 N.C. 458, 142 S.E. 474 (1928); State v. Clyburn, 195 N.C. 618, 143 S.E. 129 (1928); State v. Newsome, 196 N.C. 16, 144 S.E. 300 (1928); State v. Sentell, 208 N.C. 140, 179 S.E. 456 (1935); State v. Day, 215 N.C. 566, 2 S.E.2d 569 (1939); State v. Mayes, 216 N.C. 542, 5 S.E.2d 722 (1939); State v. Moore, 216 N.C. 543, 5 S.E.2d 719 (1939); State v. Mitchell, 216 N.C. 544, 5 S.E.2d 723 (1939); State v. Young, 216 N.C. 626, 5 S.E.2d 847 (1939); State v. Morrow, 220 N.C. 441, 17 S.E.2d 507 (1941); State v. Blue, 221 N.C. 36, 18 S.E.2d 697 (1942); State v. Wilfong, 222 N.C. 746, 24 S.E.2d 629 (1943). See State v. Alexander, 224 N.C. 478, 31 S.E.2d 357 (1944); State v. Taylor, 224 N.C. 479, 31 S.E.2d 367 (1944); State v. Buchanan, 224 N.C. 626, 31 S.E.2d 774 (1944); State v. Brooks, 224 N.C. 627, 31 S.E.2d 754 (1944).

Extension of Time for Filing. — To avoid dismissal, the appellant must get his appeal docketed within time, but the Supreme Court may, in its discretion, grant further time for filing the record if appellant filed the record proper in time and then moves for certiorari, showing delay was not attributable to him. Paris v. Carolina Portable Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967).

Extension of Time for Docketing Record. — The trial tribunal, upon motion by appellant, and upon a finding of good cause therefor, may enter an order extending the time for docketing the record on appeal in the Court of Appeals. However, this cannot be accomplished by an order allowing additional time to serve case on appeal. State v. Farrell, 3 N.C. App. 196, 164 S.E.2d 388 (1968); Ross v. Sampson, 4 N.C. App. 270, 166 S.E.2d 499 (1969); Reece v. Reece, 6 N.C. App. 606, 170 S.E.2d 546 (1969); State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

An extension of time to docket the record on appeal cannot be accomplished by an extension of time to serve the case on appeal. Kurtz v. Allstate Ins. Co., 6 N.C. App. 625, 170 S.E.2d 496 (1969); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970); State v. Gibbs, 8 N.C. App. 339, 174 S.E.2d 119 (1970).

Appellee Must Obey Rules. — A motion to dismiss an appeal upon the ground that the appellant did not cause the same to be docketed in accordance with this rule will not be granted where it appears that the appellee has also failed to comply with its requirements. One who seeks benefit under the rule must himself observe it. Barbee v. Green, 91 N.C. 158 (1884).

When Motion to Dismiss May Be Made. — A motion to docket and dismiss an appeal may be made at the beginning of the call of the district to which it belongs, or at any time thereafter during the term. In re Burwell's Will, 123 N.C. 125, 31 S.E. 382 (1898).

A motion to dismiss an appeal in the Supreme Court for failure of appellant to docket in the time required is in apt time when it is made during the term of court to which the appeal is returnable, and before the case is docketed. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911).

A motion by the appellee to docket and dismiss made before the docketing of the transcript, though not at the first opportunity, will be allowed. Worth v. City of Wilmington, 131 N.C. 532, 42 S.E. 964 (1902).

When Motion Allowed in Capital Case. — In a capital case, where the time for bringing up the case on appeal has expired, in the absence of any apparent error in the record before the court, the motion of the Attorney General to docket and dismiss, under this rule, is allowed. State v. Poole, 223 N.C. 394, 26 S.E.2d 858 (1943).

Where appellant did not docket the appeal or file transcript of the record on appeal within the time allowed, and failed to comply with mandatory rules of practice in the Supreme Court, the motion of the Attorney General to docket and dismiss will be allowed, but in a capital case this will be done only after a careful examination of the whole record fails to disclose error. State v. Scriven, 232 N.C. 198, 59 S.E.2d 428 (1950). See State v. Hall, 233 N.C. 310, 63 S.E.2d 636 (1951).

Where defendant fails to file statement of case on appeal or apply for writ of certiorari within the time allowed, the appeal will be dismissed on motion of the Attorney General, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to show error. State v. Garner, 230 N.C. 66, 51 S.E.2d 895 (1949); State v. Lewis, 230 N.C. 539, 53 S.E.2d 528 (1949).

Where a defendant convicted of a capital felony fails to file case on appeal in the superior court, the motion of the Attorney General to docket and dismiss, made after expiration of time agreed for perfecting the appeal and any extension of time which may have been granted, will be allowed after a careful inspection of the record proper fails to disclose error. State v. Nelson, 226 N.C. 529, 39 S.E.2d 391 (1946).

Appellant Not Entitled to Notice of Dismissal Motion. — An appellee entitled to move for the dismissal of an appeal because of appellants' failure to file transcript of record within the required time, is not required to give appellants notice of such motion. Johnston v. Whitehead, 109 N.C. 207, 13 S.E. 731 (1891); Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

Duty of Clerk Where Judgment Stayed but Appeal Not Docketed. — Even though execution of the judgment is stayed, unless the defendant shall proceed further and docket the appeal within the time prescribed, the clerk of the superior court wherein the case is tried should certify the facts to the Attorney General, to the end that he may move to docket and dismiss the appeal under this rule. State v. Watson, 208 N.C. 70, 179 S.E. 455 (1935).

Case on Appeal Unnecessary. — A motion to docket and dismiss an appeal will be allowed where no transcript has been docketed, and no case on appeal is necessary to entitle appellee to such dismissal. S.R. Fowle & Son v. Mitchell, 149 N.C. 581, 62 S.E. 311 (1908).

Agreement of Parties. — Where the parties have entered into a written agreement or an oral agreement not denied, that the appellee will not move to dismiss under this rule the Supreme Court will uphold the agreement and a motion to dismiss will be denied. McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917).

When Appellant Has Abandoned Appeal. — When it appears from the record on file in the Supreme Court that the appellant has abandoned his appeal below, no motion to dismiss is necessary, and it will therefore be disallowed. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911).

Withdrawal of Appeal. — Defendant's motion to withdraw his appeal may be allowed by the Court of Appeals in its discretion. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

The superior court had no authority to permit or allow a defendant to withdraw an appeal to the Court of Appeals after the appeal is docketed here. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Motion to Reinstate. — Where an appeal has been dismissed under this rule, the appellant, applying for a reinstatement upon the ground that the trial judge has failed to settle the case, must show that he has had his record proper docketed in the Supreme Court, as required by the rules, or his motion will be denied. Caudle v. Morris, 158 N.C. 594, 74 S.E. 98, modified and aff'd, 160 N.C. 168, 76 S.E. 17 (1912).

A motion to reinstate a case on appeal must be denied when based on the same grounds upon which it was properly dismissed. McDowell v. Kent, 153 N.C. 555, 69 S.E. 626 (1910).

Where an appeal has been dismissed for failure to docket the transcript on appeal in proper time, it will not be reinstated upon the ground that appellant's counsel was prevented from appearing to settle the case before the trial judge on the days designated for the purpose, by other urgent business of his client, the appellant, requiring his presence elsewhere. Parker v. Southern Ry., 121 N.C. 501, 28 S.E. 347 (1897).

A brief entitled "Reply to Argument of Appellees" that was filed with the clerk of the Court of Appeals after argument in that court was not considered where appellant failed to obtain leave of the court as required by this rule. Roughton v. Jim Walter Corp., 8 N.C. App. 325, 174 S.E.2d 389 (1970).

Rule 13

Filing and Service of Briefs

(a) **Time for Filing and Service.** Within 20 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. In civil appeals in forma pauperis, no printed record is created; accordingly, appellant's 20 days for filing and serving the brief shall run from the date of docketing the record on appeal in the appellate court. Within 20 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief.

(b) **Copies Reproduced by Clerk.** A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible photocopies thereof.

(c) **Consequence of Failure to File and Serve Briefs.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court. (Amended January 1, 1981; February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules or statutes: Sup. Ct. Rules 25, 26, 27, 27½, 28, 29 (and Ct. App. counterparts).

Commentary:

General. This Rule deals directly only with the filing and service of briefs in appeals from the trial courts. It does not apply to intra-appellate division appeals under Article III, which contains its own provisions on the subject. Administrative agency appeals under Art. IV incorporate the provisions of this Rule by reference. This Rule does not deal with the form, function, and content of briefs, a matter which App. R. 28 controls.

Subdivision (a) is self-explanatory as to operation. Freed from the "district call" mode of hearing appeals, this rule simply continues the open-ended timetable for taking the various steps in the appellate process.

Subdivision (b) is self-explanatory. For general background, see the Commentary to App. R. 12(c).

Subdivision (c) carries forward in minor restatement certain provisions of former Sup. Ct. Rules 28 and 29.

CASE NOTES

Applied in In re Revocation of License to Operate Motor Vehicle of Church, 29 N.C. App. 511, 224 S.E.2d 697 (1976).

Cited in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); City of Burlington v. Town of Elon College, — N.C. —, 311 S.E.2d 289 (1983); Mazza v. Medical Mut. Ins. Co., — N.C. —, 311 S.E.2d 289 (1983).

ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

Rule 14

Appeals of Right from Court of Appeals to Supreme Court Under G.S. 7A-30

(a) **Notice of Appeal; Filing and Service.** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) **Content of Notice of Appeal.**

(1) **Appeal Based Upon Dissent in Court of Appeals.** In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) **Appeal Presenting Constitutional Question.** In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies.** Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) **Briefs.**

(1) **Filing and Service; Copies.** Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 20 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 20 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the Clerk two legible copies thereof.

(2) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the Court. (Amended January 31, 1977; January 1, 1981; February 1, 1985.)

Drafting Committee Note

Sources or parallels in former rules or statutes: Supp. Rules 3, 5, 6, 7, 8.

Commentary:

General. This Rule 14 and succeeding Rule 15 cover in general all matters covered by former Supplementary Rules 1-13. This rule deals comprehensively with appeals of right under G.S. § 7A-30, and Rule 15 with discretionary appeals upon certification either prior to or following Court of Appeals' determination. Various rules in *General Provisions* Article VI apply to different aspects of the practice covered by these two rules: App. R. 25 (dismissal for failure to perfect appeal); App. R. 26 (filing and service); App. R. 27 (computation and extension of time); App. R. 28 (function and content of briefs); App. R. 29 (calendaring and call of appeals); App. R. 30 (oral argument); App. R. 31 (petition for rehearing); App. R. 37 (motion practice).

Subdivision (a) carries forward the time limit provided in former Supp. R. 3(a). The provisions for tolling by filing of a petition for rehearing and for tolling as to all other parties by filing a notice of appeal by any party are new. Reciprocally, a notice of appeal or petition for discretionary review waives the rehearing option. App. R. 31(f). Note changed language "issuance of mandate" rather than "certificate of the clerk," to conform to the language of App. R. 32.

Subdivision (b) carries forward in unchanged substance the provisions of former Supp. R. 3(b).

Note that the only requirement as to substantive content of the notice of appeal is for the jurisdictional basis (in fact and law) for the asserted right to have Supreme Court review. It is not necessary in the notice of appeal to specify the whole range of questions which the appellant is entitled to present and intends to present if the appeal is entertained as properly based jurisdictionally. This is the office of the new brief required by subdivision (d)(1) of this rule to be filed in the Supreme Court. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence the appeal of right . . . is based," but extends to all questions "properly presented in the new briefs." See, so holding independently of a direct rule provision, *State v. Colson,* 274 N.C. 297, at 305 (1968) (appeal properly grounded in substantial constitutional question entitles to review on any other questions properly presented); but cf. *State v. Horn,* 285 N.C. 82, at 84 (1974) (dictum apparently *contra;* but Court indicated consideration nevertheless of the non-constitutional questions). The Rules herein cited, by clearly codifying the rule announced in *Colson,* remove any question on the point.

See, for an illustrative form of notice of appeal under this Rule, Committee Form 3.

Subdivision (c). The first sentence of subsection (1) carries forward unchanged in substance the provisions of former Supp. R. 5(a). The last sentence of this subsection is new and preserves to the Supreme Court the opportunity to enforce these Rules independently of any prior acceptance by the Court of Appeals of a record on appeal. Subsection (2) is designed to conform to developed clerical practice under the former Supplementary Rules, and makes the transmission and docketing of records on appeal within the appellate division purely a ministerial function of the respective clerks. Details of the manner of procurement or reproduction of copies of the record and of the number and recipients of distribution remain to administrative direction of the court.

Subdivision (d). Subsection (1) alters the timetable for filing and service provided by the former Supplementary Rules: from 10 days to 20 days from date of docketing the record for the appellate's brief; from 20 days after docketing of the record to 15 days after service of appellant's brief, for the appellee's brief. The provision for filing but single copies of briefs for reproduction of copies by the clerk conforms to the practice described in the Commentary to Rule 13(b) for filing briefs in appeals from the trial courts. While this subsection deals basically only with filing and service requirements, leaving function and content to App. R. 28, which covers that subject as to *all* briefs, there is the important requirement in this subsection that the briefs filed under this Rule 14 in the Supreme Court shall be *new.* This removes the option given by former Supp. R. 8 to file a brief which merely *supplements* the Court of Appeals brief. The reason for requiring new briefs in all cases is developed in detail in the Commentary to App. R. 28(d). That subdivision permits incorporation in whole or in part of all or portions of the *argument* section of the briefs filed in the Court of Appeals into the argument section of the *new* brief required by this subdivision.

Subsection (2) carries forward unchanged in substance a comparable provision in former Supp. RR. 28 and 29.

Editor's Note. — The 1984 amendment to this rule, approved November 27, 1984, is applicable to all appeals in which the notice of appeal is filed on or after February 1, 1985.

CASE NOTES

Applied in Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Beck v. Carolina Power & Light Co., 307 N.C. 267, 297 S.E.2d 397 (1982).

Stated in State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Cited in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982); Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984).

Rule 15

Discretionary Review on Certification by Supreme Court Under G.S. § 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any of the grounds specified in G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the Utilities Commission, the North Carolina State Bar, the Property Tax Commission, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15A, Art. 89.

(b) **Same; Filing and Service.** A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for review. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) **Same; Content.** The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. § 7A-31 for discretionary review. The petition shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) **Response.** A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response.

(e) **Certification by Supreme Court; How Determined and Ordered.**

(1) **On Petition of a Party.** The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court.** The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders: Filing and Service.** Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies.** When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the original record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner, to cover the costs thereof.

(g) **Filing and Service of Briefs.**

(1) **Cases Certified Before Determination by Court of Appeals.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 20 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 20 days after a copy of appellant's brief is served upon him.

(3) **Copies.** A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will

himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders.** An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by that Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined.** As used in this Rule 15, the terms *appellant* and *appellee* have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, *appellant* means a party who appealed from the trial tribunal; *appellee,* a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals upon the Court's own initiative, *appellant* means the party aggrieved by the determination of the Court of Appeals; *appellee,* the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 15. (Amended January 1, 1981; November 18, 1981.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. Rules 1, 2, 4, 5, 6, 7, 8, 11, 13.

Commentary:

General. For coverage of this rule in conjunction with that of App. R. 14, see General Commentary to the latter. Note that this Rule 15 deliberately avoids use of the term "certiorari" to describe the procedure by which under the jurisdictional statute, G.S. § 7A-31, the Supreme Court exercises its discretionary power to review cases originally docketed for review in the Court of Appeals. Instead, the terms "certification," "certify for review," "petition for discretionary review," are used to conform directly to the statutory language and the procedure therein described, and to distinguish this procedure from that for review by the extraordinary writ of certiorari, which is dealt with in App. R. 21.

Subdivision (a) lays the basis for the rule's coverage of both by-pass and post-determination review procedures.

Subdivision (b) carries forward the time limits for petition for discretionary review provided in former Supp. R. 1 (by-pass) and Supp. R. 2 (post-determination). For commentary on the provision for tolling by filing a petition for rehearing in the Court of Appeals and the reciprocal effect of waiver of rehearing by petition for discretionary review, see Commentary to App. R. 14(a).

Subdivision (c). The provision for accompanying a post-determination petition with a copy of the Court of Appeals' opinion is from former Supp. R. 5(b). The other provisions supplant and serve the function of those provisions of former Supp. Rules 1 and 2 which borrowed certiorari writ practice by reference to former Sup. Ct. R. 34.

Note that the rule requires only that the petition contain a statement of the jurisdictional basis (in fact and law) for the review being sought. It is *not* necessary in the petition to specify the whole range of questions which the petitioner is entitled to present and intends to present if the case is certified for review. That is the office of the new brief required by subdivision (g)(2) of this rule to be filed upon certification. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence ... the discretionary review is based," but extends to all questions then "properly presented in the new briefs."

See, for an illustrative form of a petition for discretionary review under this Rule, Committee Form 4.

Subdivision (d). Former Supp. Rules 1 and 2 in effect borrowed the certiorari *writ* practice sketched in former Sup. Ct. R. 34 for the discretionary review practice which is the subject of this new Rule 15. One of the former rule's features was a provision for response by other parties to such a petition. This subdivision carries this forward by direct statement.

Subdivision (e). Subsections (1) and (2) state directly what was merely implicit in former Supplementary Rules, which did not speak directly to the decision process on petitions for discretionary review. Subsection (3) carries forward, unchanged in substance but with some elaboration, the provision of former Supp. Rules 6, 8, and 13.

Subdivision (f). Subsection (1), first sentence, carries forward, unchanged in substance, the provisions of former Supp. R. 5(a). The second sentence is new. See Commentary to comparable App. R. 14(c)(1).

Subsection (2) conforms to developed clerical practice not directly stated in former Supplementary Rules. See Commentary to App. R. 14(c)(2).

Subdivision (g). Subsection (1) carries forward, unchanged in substance, the provisions of former Supp. RR. 6 and 11 controlling the filing and service of briefs in "by-pass" review situations whether on party or court initiative.

Subsection (2) carries forward the essential provisions of former Supp. RR. 7 and 8 controlling the filing and service of briefs in cases involving review by the Supreme Court of Court of Appeals determinations, but with two significant alterations from former practice: 1) The timetable for filing and service is changed: as to the appellant's brief, from 10 days to 20 days after docketing in the Supreme Court (see App. R. 15(e)(3) for time when docketing occurs); as to the appellee's brief, from 20 days after docketing in the Supreme Court to 15 days after service of appellant's brief. 2) The option to file *supplementary* briefs is removed; filing of *new* briefs is required. See Commentary to App. R. 14(d)(1).

Subsection (3) covers the filing of briefs in both by-pass and post-determination review cases. In by-pass review situations the responsibility for filing in the Supreme Court will depend upon whether the party has already filed his brief in the Court of Appeals before the case is certified for review. App. R. 15(g)(1). In post-determination situations filing will always be by the party and will be of the *new* brief required by App. R. 15(g)(2). This subdivision (3) is simply saying that in whatever situation only one copy of that brief need be filed in the Supreme Court to satisfy the *filing* requirement.

Subsection (4) carries forward, unchanged in substance, a comparable provision in Supp. RR. 28 and 29.

Subdivision (h) carries forward the comparable provision in former Supp. R. 2, and is drawn ultimately from G.S. § 7A-31.

Subdivision (i). From former Supp. R. 4.

CASE NOTES

Applied in Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982); Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984).

Cited in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); Bell v. Brock, — N.C. —, 312 S.E.2d 880 (1983).

Rule 16

Scope of Review of Decisions of Court of Appeals

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court. No assignments or cross-assignments of error to the decision of the Court of Appeals are required as the basis for the presentation of questions for review by the Supreme Court. A party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals, and is not limited to those actually determined by the Court of Appeals nor to those questions upon whose existence the appeal of right or the discretionary review is based. A party who was an appellee in the Court of Appeals and is an appellant in the Supreme Court may present in his brief any questions going to the basis of the Court of Appeals' decision by which he is aggrieved, and any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals. A party who was an appellee in the Court of Appeals and is an appellee in the Supreme Court may present any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals.

(b) **Scope of Review in Appeal Based Solely Upon Dissent.** Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues which are specifically set out in the dissenting opinion as the basis for that dissent and are properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

(c) **Appellant, Appellee Defined.** As used in this Rule 16, the terms *appellant* and *appellee* have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, *appellant* means the petitioner, *appellee* means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, *appellant* means the party aggrieved by the decision of the Court of Appeals; *appellee,* the opposing party. Provided, that in its order of certification the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 16. (Amended January 1, 1984.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. R. 2 (only first sentence of subdivision (a)).

Subdivision (a) is designed to give hitherto lacking detailed guidance to counsel in dealing with the special problems posed by second review in a two-tiered appellate court system. The first sentence is drawn directly from the last sentence of former Supp. R. 2, and expresses the critical feature of second review by the higher court: that it is the decision of the first reviewing court which is under direct review. The rest of the subdivision is new and lays down certain corollaries to this root principle. These take into account the following points: 1) that the parties may or may not have changed positions as appellant and appellee on the second review; 2) that, following App. RR. 10(d) and 28(c), questions may properly be presented for review at both levels by both appellants and appellees; 3) that the *potential* scope of review by the higher court is limited only by the questions properly presented on first review in the first reviewing court, and not by the scope or basis of the latter's decision. See *State v. Colson,* 274 N.C. 295 (1968); 4) that within this *potential* scope of second review, the *actual* scope should be limited to those precise questions chosen and identified by the parties in their briefs as those for review by the higher court. Other rules which operate in important conjunction with this Rule 16 are cross-referred to emphasize the interrelation: 1) App. Rules 14(d)(1) and 15(g)(2) both force the conscious choice of precise questions for higher court review by their requirements that in both appeals of right and in discretionary appeals, both parties shall file *new* briefs in the Supreme Court; 2) App. R. 28, dealing with the function and content of briefs, requires both parties to state the questions being presented for review by the court to which appeal is taken, and in subdivision (c) spells out the procedure by which appellees in the Court of Appeals may in their briefs present questions for review. See Commentary to App. Rules 10(d) and 28(c). Notice that neither party is required to make assignments of error or cross-assignments of error with respect to the Court of Appeals decision.

Subdivision (b), by its forced definition of terms, permits a single set of descriptives "appellant" and "appellee" to be used in designating the parties in discretionary review cases as well as appeals of right, and within the discretionary review category, to both party-initiative and court-initiative situations. It is drawn from former Sup. Ct. R. 4.

Legal Periodicals. — For 1984 survey of appellate procedure, "Appellate Rule 16(b) and New Requirements for Appeals of Right," see 63 N.C.L. Rev. 1074 (1985).

CASE NOTES

Scope of Review Limited in Appeals of Right Based on Dissent. — The intent of section (b) of this rule, effective with notices of appeal filed in the Supreme Court on and after January 1, 1984, is to further ensure that in appeals of right based solely upon dissent, review by the Supreme Court shall be limited to those questions on which there was division in the intermediate appellate court. Such review has never been intended for claims on which that court has rendered unanimous decisions. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 311 N.C. 170, 316 S.E.2d 298 (1984).

Where a plaintiff's appeal is based solely on the existence of a dissent in the Court of Appeals, the scope of the Supreme Court's review on the plaintiff's appeal is limited to the issues raised in that dissent. Penley v. Penley, — N.C. —, 332 S.E.2d 51 (1985).

On appeal to the Supreme Court pursuant to § 7A-30(2) by defendant from a decision of the Court of Appeals, one judge dissenting, in which a majority of the panel found no error in defendant's convictions of felonious breaking and felonious larceny, where the dissent in the Court of Appeals disagreed only with the majority's treatment of the second question presented to that court, and defendant did not petition the Supreme Court for discretionary review of the other questions, only the second question was properly before the Supreme Court for review, notwithstanding defendant's attempt to bring forward other questions in his brief. State v. Reilly, — N.C. —, 329 S.E.2d 381 (1985), considering, however, also the question of the sufficiency of the evidence on the question of guilt, in order to prevent manifest injustice.

Issues Not Set Out in Dissent. — Where an appeal of right is taken to the Supreme Court based solely on a dissent in the Court of Appeals, and the dissenter does not set out the issues upon which he bases his disagreement with the majority, the appellant has no issue properly before the court. Such appeals are subject to dismissal. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 311 N.C. 170, 316 S.E.2d 298 (1984).

Questions Must First Be Presented in Court of Appeals. — The potential scope of review by the Supreme Court is limited by the questions properly presented for first review in the Court of Appeals. The attempt to smuggle in new questions is not approved. Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

Only Decision of Court of Appeals Is Before Supreme Court for Review. — After there has been a determination by the Court of Appeals, review by the Supreme Court, whether by appeal of right or by discretionary review, is to determine whether there is any error of law in the decision of the Court of Appeals and only the decision of that court is before the Supreme Court for review. Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

Effect of Equally-Divided Supreme Court. — Where one member of the Supreme Court does not participate in the consideration or decision of a case, and the remaining six justices are equally divided as to whether the decision of the Court of Appeals should be affirmed or reversed, the decision of the Court of Appeals is affirmed without becoming a precedent. Wayfaring Home, Inc. v. Ward, 301 N.C. 518, 272 S.E.2d 121 (1980); Greenhill v. Crabtree, 301 N.C. 520, 271 S.E.2d 908 (1980).

Applied in State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 240 S.E.2d 345 (1978); State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980); In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980); Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980); Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980); Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); State v. Cox, 303 N.C. 75, 277 S.E.2d 376 (1981); Brown v. Fulford, 311 N.C. 205, 316 S.E.2d 220 (1984); In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); State v. Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984); Pembee Mfg. Corp. v. Cape Fear Constr. Co., — N.C. —, 329 S.E.2d 350 (1985).

Stated in State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., — N.C. —, 332 S.E.2d 397 (1985).

Cited in Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979); Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979); State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981); Colonial Pipeline v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984); State v. Atkins, 311 N.C. 272, 316 S.E.2d 306 (1984); Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985).

Rule 17

Appeal Bond in Appeals Under G.S. §§ 7A-30, 7A-31

(a) **Appeal of Right.** In all appeals of right from the Court of Appeals to the Supreme Court, in civil cases the party who takes appeal shall, upon filing the record on appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of $200, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) **Discretionary Review of Court of Appeals Determination.** When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination.** When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals in Forma Pauperis.** No undertakings for costs are required of a party appealing in forma pauperis. (Amended July 1, 1978.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. R. 18.

Commentary:

This rule simply carries forward, in slightly re-stated form, the provisions of former Supp. R. 18. It does state explicitly, in the second sentence of subdivision (b), what is only implied in the former Supplementary Rule — that upon certification for review of a Court of Appeals determination on initiative of the Supreme Court, no appeal bond is required. Notice that these provisions for securing costs in intra-Appellate Division appeals are independent of those of App. Rules 6 and 7 for securing the costs of initial appeal from the trial courts, except to the extent that security there given stands good on the by-pass appeal under subdivision (c).

Editor's Note. — The order which amended this rule and repealed Rule 7 provides:

"Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, 'In criminal cases no security for costs is required upon appeal to the appellate division.' Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

"The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

"Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use."

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION

Rule 18.

Taking Appeal; Record on Appeal—Composition and Settlement

(a) **General.** Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) **Time and Method for Taking Appeals.**

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Composition of Record on Appeal.** The record on appeal in appeals from any agency shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same; (iii) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed with the agency to present and define the matter for determination; (iv) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken; (v) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3); (vi) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned; (vii) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3); (viii) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3); and (ix) exceptions and assignments of error to the actions of the agency, set out as provided in Rule 10.

(d) **Settling the Record on Appeal.** The record on appeal may be settled by any of the following methods:

(1) **By Agreement.** Within 60 days after appeal is taken, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 60 days after appeal is taken, file in the office of the agency head and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon him, an appellee may file in the office of the agency head and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference or Agency Order; Failure to Request Settlement.** If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the agency head to convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order re-

sults in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or his delegate shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency; provided, however, that when the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) **Further Procedures.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these Rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time.** The times provided in this Rule for taking any action may be extended in accordance with the provisions of Rule 27(c). (Amended June 21, 1977; October 7, 1980, eff. January 1, 1981; February 27, 1985, eff. March 15, 1985).

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 62-90(a) (Utilities Commission appeals); 97-86 (Industrial Commission appeals); 58-9.5(1) and (2) (Commissioner of Insurance appeals).

Commentary.

General. The statutes referred to in the sources and parallels noted above have provided details of the appellate procedure for appeals from the three state agencies indicated directly to the Court of Appeals. In conjunction with promulgation of these rules, those provisions have been stripped from the respective statutes by amendment, and are now incorporated in this Rule 18 as a practically comprehensive procedure for appeals from all three agencies. That procedure is uniform except in one respect, spelled out in subsection (3) of subdivision (d), concerning the mode of settlement of the record on appeal where the parties fail to agree. See the Commentary to that provision. The prescribed procedure substantially parallels, as did the statutory provisions, that provided for appeals from the trial courts. There are a few deviations, which are specifically identified in the Rule and App. R. 20 as matter retained in the governing statutes.

Subdivision (a) "borrows" in general the appellate procedure prescribed in these rules for appeals from the trial courts, except as that procedure is specifically spelled out in this Rule 18, or is retained in statutory prescriptions which are in turn identified in this and the succeeding two rules which make up this Article IV. This Rule 18 takes the procedure, including that left to statutory prescription, generally down to the point of certification of the record on appeal. At that point subdivision (f) specifically defers to the subsequent procedures provided in these rules for appeals from the trial courts.

Subdivision (b) defers to the retained statutory provisions because of their possible jurisdictional significance.

Subdivision (c) follows the format of App. R. 9(b) in specifying for agency appeals the items constituting the record on appeal. The items identified either duplicate or are appropriate analogues to comparable items specified for civil appeals.

Subdivision (d) parallels, practically identically, the procedure for settling records on appeal from the trial courts as specified in

App. R. 11. There is one variation among the three agencies, which is dealt with in subsection (3): the mode of "judicial" settlement in the event of failure to settle by party agreement or exchange. Here, taking into account the possible involvement of the agency itself in appeals from the Utilities Commission and the Commissioner of Insurance, settlement is to be attempted first by an agency-supervised conference, and if this fails, by a referee appointed by the Chief Judge of the Court of Appeals. In Industrial Commission appeals, wherein the agency is not potentially a party in interest, settlement is to be by the agency head in the manner of the judge of a trial court. There is also a related variation in the timetable for settling records in agency appeals from that provided for trial court appeals: the agency head has 20 days rather than 15 days to call a settlement conference. Cf. App. R. 11(c).

Subdivision (e) parallels the comparable procedure for certification of trial court records. Cf. App. R. 11(e), substituting the agency head or his delegate as the certifying authority.

Subdivision (f) borrows all necessary further procedures — which would include those provided in App. R. 12 for filing the record on appeal and in App. R. 13 for filing and serving briefs — from the trial court appeal procedures. While this subdivision does not specifically refer to them, the procedures laid down in the rules found in Art. VI, "General Provisions," governing such matters as filing and service, extensions of time, content of briefs, etc., are by their terms also applicable, as appropriate, to these agency appeals.

Editor's Note. — The order of the Supreme Court of February 27, 1985, which amended this rule and Rule 20 and deleted Rule 19, provides that inasmuch as the rules affected make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which were amended on November 27, 1984, to be effective February 1, 1985, the amendments of February 27, 1985, shall be applicable to all appeals in which the notice of appeal is filed on or after March 15, 1985.

CASE NOTES

Applied in State v. Williams, 40 N.C. App. 178, 252 S.E.2d 245 (1979); State ex rel. Utilities Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838 (1980); Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

Stated in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

Rule 19

[Reserved]

Editor's Note. — Rule 19 was repealed by order of February 27, 1985, effective March 15, 1985.

The order of the Supreme Court of February 27, 1985, which repealed this section and amended Rules 18 and 20, provides that inasmuch as these rules make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which were amended on November 27, 1984, to be effective February 1, 1985, the amendments adopted February 27, 1985, shall be applicable to all apeals in which the notice of appeal is filed on or after March 15, 1985.

Rule 20

Miscellaneous Provisions of Law Governing in Agency Appeals

Specific provisions of law pertaining to stays pending appeals from any agency to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure. (Amended February 27, 1985, eff. March 15, 1985.)

Drafting Committee Note

Sources or parallels in former rules or statutes: None.

Commentary.

This rule is necessitated by the fact that as to the matters specified statutory procedures peculiar to the three agencies and differing from parallel procedures provided in these rules continue to control. This disclaimer of rule authority avoids any possible conflict. The matters specified are deemed to pertain so closely to legislative control of these quasi-judicial bodies, including their financing and the limits of the powers delegated to them by the legislature vis-a-vis those of the legislature and the courts (i.e. scope of judicial review, and permissible mandates of the reviewing court) that they must continue to be controlled by statute rather than appellate rule-making authority.

Editor's Note. — The order of the Supreme Court of February 27, 1985, which amended this rule and Rule 18 and repealed Rule 19, provides that inasmuch as the rules affected make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which were amended on November 27, 1984, to be effective February 1, 1985, the amendments of February 27, 1985, shall be applicable to all appeals in which the notice of appeal is filed on or after March 15, 1985.

ARTICLE V. EXTRAORDINARY WRITS

Rule 21

Certiorari

(a) **Scope of the Writ.**

(1) **Review of the Judgments and Orders of Trial Tribunals.** The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals.** The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of orders of the Court of Appeals when no right of appeal exists.

(b) **Petition for Writ; to Which Appellate Court Addressed.** Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.** Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. (Amended November 18, 1981; February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 34.

Commentary.

General. This rule builds upon and attempts to clarify the certiorari writ practice provisions of former Sup. Ct. R. 34. As indicated in the General Commentary to App. R. 15 dealing with discretionary review by the Supreme Court under G.S. § 7A-31, that practice is by these Rules clearly differentiated in form and in terms from the extraordinary writ practice described in this Rule 21. The former Supplementary Rules in effect "borrowed" the Sup. Ct. R. 34 certiorari writ practice as the procedure by which determinations were made by the Supreme Court to "certify" Court of Appeals determination for discretionary review under G.S. § 7A-31. Former Supp. R. 2(a)(3). In these rules, App. R. 15 prescribes internally a "certification" practice for such cases; and this Rule 21 is confined in terms and in form to the traditional extraordinary writ function of classic certiorari as a means of review outside the regular appeal route.

Subdivision (a) establishes that certiorari may lie from either appellate court to permit review of trial tribunal judgments when ordinary appeal right has been lost or does not exist because of the interlocutory character of the judgment. ("Trial tribunal" includes, per App. R. 1, the district and superior courts, and the three state agencies from which appeals lie to the Court of Appeals.) Further, that certiorari may lie from the Supreme Court to review Court of Appeals determinations when the right to regular appeal has been lost. Specification of which of the appellate courts may properly issue the writ to trial tribunals is left to subdivision (b). And the practice within either court is left to subdivision (c).

Subdivision (b) points to the correct appellate court to petition for the writ in any case. It is that court to which either party *might* have a right to appeal from any final judgment of the tribunal sought to be reviewed. This means that the petition must always be addressed to the Court of Appeals in any case before the three state agencies of Article IV, and in any case before the trial courts except a criminal case wherein a sentence of death or life imprisonment is possible or has been entered. In the latter case the petition must be addressed to the Supreme Court. In any case in the Court of Appeals wherein the writ may be sought, it must obviously by this Rule be sought in the Supreme Court. In cases where the writ is denied by the Court of Appeals, the petitioner must seek review of that determination under the general appeal provisions of App. R. 14 (of right) or App. R. 15 (discretionary review) as the case may dictate. Only if the right to seek regular review by either of these routes has been lost by failure to take timely action could a petitioner refused certiorari in the Court of Appeals seek review of that refusal by a second petition to the Supreme Court.

Subdivision (c), following traditional practice in the use of this discretionary writ, provides no specific time limit for filing the petition. The question of timeliness in a particular case is to be determined as a part of the general question of its propriety as an extraordinary mode of review. The other provisions of this subdivision elaborate upon the more sketchy descriptions of the practice contained in former Sup. Ct. R. 34.

Subdivision (d) carries forward in restated form, but unchanged in substance, the provisions of former Sup. Ct. R. 34.

See Committee Form 8, "Petition for Writ of Certiorari Under Rule 21", for an illustrative form.

Cross Reference. — As to certiorari generally, see § 1-269 and notes thereto.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Habeas Corpus Proceedings for Prisoners under Sentence of Death or Life Imprisonment. — By analogy, subdivision (b) of this Rule and § 7A-27(a), and repealed § 15-180.2 were logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

The Court of Appeals has authority to issue writ of certiorari to review trial court order "when no right of appeal from an interlocutory order exists." But, where authority was exercised by another panel of the court with respect to the matters presented, its grant of certiorari is the law of the case and cannot be overruled by any panel of the Court of Appeals. Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

Applied in State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510 (1981); Harding v. North Carolina, 683 F.2d 850 (4th Cir. 1982); State v. Walker, — N.C. —, 300 S.E.2d 553 (1983); Latch v. Latch, 63 N.C. App. 498, 305 S.E.2d 564 (1983); Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983); Stephenson v. Rowe, 69 N.C. App. 717, 318 S.E.2d 324 (1984); Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984); Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984); Department of Social Servs. v. Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984); In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984).

Quoted in Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979).

Stated in Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); State v. Cook, — N.C. —, 323 S.E.2d 928 (1984); State v. Huggins, — N.C. —, 323 S.E.2d 928 (1984); State v. Owens, — N.C. —, 323 S.E.2d 928 (1984).

Cited in Black v. Clark, 36 N.C. App. 191, 243 S.E.2d 808 (1978); Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980); Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980); Pendley v. Ayers, 45 N.C. App. 692, 263 S.E.2d 833 (1980); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); Moore v. Moody, 304 N.C. 719, 285 S.E.2d 811 (1982); Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982); State v. Crews, — N.C. —, 302 S.E.2d 457 (1983); Rudder v. Lawton, 62 N.C. App. 277, 302 S.E.2d 487 (1983); State v. Milby, — N.C. —, 305 S.E.2d 189 (1983); State v. Pitts, 309 N.C. 324, 307 S.E.2d 172 (1983); State v. McDaniel, — N.C. —, 307 S.E.2d 371 (1983); State v. Thompson, — N.C. —, 308 S.E.2d 64 (1983); State v. Langley, — N.C. —, 311 S.E.2d 289 (1983); State v. Crews, — N.C. —, 311 S.E.2d 290 (1983); State v. Jeffus, — N.C. —, 311 S.E.2d 590 (1983); Industrotech Constructors, Inc. v. Duke Univ., 67 N.C. App. 741, 314 S.E.2d 272 (1984); State v. Couch, 312 N.C. 799, 325 S.E.2d 634 (1985); State v. McCray, — N.C. —, 331 S.E.2d 123 (1985); State v. Osby, — N.C. —, 331 S.E.2d 123 (1985).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rule 34, Rules of Practice in the Supreme Court of North Carolina.

Rule Strictly Applied. — Failure to comply strictly with the regulations contained in this rule will result in a dismissal. In re McCoy, 233 F. Supp. 409 (E.D.N.C. 1964).

When Certiorari Should Be Applied for. — Where the appellant can show good and sufficient cause why his case on appeal had not been docketed in the Supreme Court in the time required by the rules, or that he was not at fault, he should file a transcript of the record proper and move for a certiorari for the statement of the case, which may be done at any time during the term before appellee moves to dismiss it. McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917); Rose v. Rocky Mount, 184 N.C. 609, 113 S.E. 506 (1922).

Further Time Not Matter of Right. — Where the record of a case on appeal is not docketed in the Supreme Court at the time required, it will be dismissed, but the court may, in its discretion and not as a matter of right of the appellant, grant further time for the filing of the record, if the appellant files the record proper in apt time and thereupon moves for a certiorari, showing that the delay was not attributable to himself. State ex rel. Mills v. National Sur. Co., 192 N.C. 52, 133 S.E. 172 (1926); Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126 (1930).

Effect of Agreement for Extension of Time. — Where the parties have agreed upon an extension of time for the service of their respective cases on appeal that the delay will cause the docketing of the case too late to come within the rule, the appellant having used his full time may not successfully move the Supreme Court for a certiorari upon the ground that the delay was caused by a loss of the papers in it, for which he was not responsible, without proof sufficient to overcome evidence in denial of the allegation. Baker v. Hare, 192 N.C. 788, 136 S.E. 113 (1926).

Legal Excuse Decided by Supreme Court. — Whether the appellant has legal excuse in not docketing his case on appeal in time for it to be regularly heard at the call of the district to which it belongs is a matter for the Supreme Court to determine upon his docketing the record proper and moving for a certiorari under the rule. State v. Johnson, 183 N.C. 730, 110 S.E. 782 (1922).

Question of Laches May Be Heard. — Where the appellant asserts that he is not in default in docketing his appeal in the time required by the rule, he may apply for a certiorari to bring up the transcript of the case, or the omitted part, and thus only have the question of his laches therein passed upon. Stone v. Ledbetter, 191 N.C. 777, 133 S.E. 162 (1926).

Motion Too Late after Argument. — Where the plaintiff's motion for a certiorari was disallowed at a former term of the Supreme Court without prejudice, for the purpose of allowing him to renew his motion after he had applied to the trial judge to correct the case, the plaintiff should again move the court for a writ before the call of the district to which the case belonged, and it comes too late after argument of the case. Todd v. Mackie, 160 N.C. 352, 76 S.E. 245 (1912).

Motion Denied after Appeal Dismissed. — A motion for a certiorari to bring up the case on appeal will be denied if made after the appellee has had it docketed and dismissed. Cox v. Kinston Carolina R.R. & Lumber Co., 177 N.C. 227, 98 S.E. 704 (1919).

When Appellee Prevents Timely Docketing of Appeal. — Where the appellant is prevented from docketing his appeal within the time prescribed, in consequence of the conduct of the appellee or his counsel, he is entitled to the writ of certiorari to bring up the case. Briggs v. Jervis, 98 N.C. 454, 4 S.E. 631 (1887).

Appellant Must Docket All Available Record. — When the appeal is not docketed at or before the time prescribed, the appellant must docket all of the record proper, or so much thereof as he can obtain, with an affidavit, as to why the entire record cannot be docketed and move at that time for a certiorari. If he fails to do so, the appellee has the right to docket the certificate and have the appeal dismissed. Caudle v. Morris, 158 N.C. 594, 74 S.E. 98, modified and aff'd, 160 N.C. 168, 76 S.E. 17 (1912); State v. Johnson, 183 N.C. 730, 110 S.E. 782 (1922); Hardy v. Heath, 188 N.C. 271, 124 S.E. 564 (1924).

Appellant's motion for a writ of certiorari will be denied where the petition is not verified and no transcript of the record has been filed nor any good reason shown for failure to file it. Critz v. Sprager, 121 N.C. 283, 28 S.E. 365 (1897); Rothchild v. McNichol, 121 N.C. 284, 28 S.E. 364 (1897).

Filing of Original Papers Insufficient. —

A transcript of the record proper should be filed by appellant in the Supreme Court to entitle him to move for a certiorari; and the filing of the original papers, which should remain in the office of the superior court, is insufficient. Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916).

When Case on Appeal Not Prepared. — Where a case and counter-case are served within the time as extended by agreement, but neither is accepted, appellant must immediately request a settlement, file the record proper, and sue out certiorari; otherwise appellee may move to docket and dismiss. Waynesville Transp. Co. v. Waynesville Lumber Co., 168 N.C. 60, 84 S.E. 54 (1915); Washam & Patterson Motor Co. v. Reep, 186 N.C. 509, 119 S.E. 821 (1923).

Certiorari Denied When Case Unsettled in Agreed Time. — Where the parties to an action have agreed, or the judge at their request has allowed an extension of time for service of case and counter-case, etc., that will prevent its being docketed in the time, and consequently no case has been settled by the trial judge, appellant's motion in the Supreme Court for a writ of certiorari will be denied. Waller v. Dudley, 193 N.C. 354, 137 S.E. 149 (1927).

Appeal by Person without Counsel Treated as Petition for Certiorari. — Where plaintiff, appearing in propria persona because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for certiorari. Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963), cert. denied, 379 U.S. 850, 85 S. Ct. 93, 13 L. Ed. 2d 53, rehearing denied, 379 U.S. 925, 85 S. Ct. 279, 13 L. Ed. 2d 338 (1964).

Failure to Pay Clerk's Fees. — The failure of the clerk below to send up the transcript after the case on appeal had been filed in his office will not excuse appellant's failure to have the transcript or case on appeal filed, where there is no allegation that the appellant had tendered the fees for such transcript and was otherwise free from laches. Critz v. Sprager, 121 N.C. 283, 28 S.E. 365 (1897).

Extent of Waiver by Consent. — The parties to an appeal, without the consent of the court, cannot waive the rule of the Supreme Court requiring that a transcript of the record proper, or all thereof that may be had, shall be filed therein as the basis for the motion for a certiorari; but they may, by written agreement, consent that the appeal may be docketed at the next ensuing term of the Supreme Court. Murphy v. Carolina Elec. Co., 174 N.C. 782, 93 S.E. 456 (1917).

Application for Certiorari in Criminal Case. — Where the appellant in a criminal action has failed to have his case docketed in the time required by the rules in the Supreme Court, in order to preserve his right to appeal it is required that he file an application for a certiorari, addressed to the sound discretion of the Supreme Court, and show a good and sufficient reason for granting his motion therefor, and where this has not been done the appeal will be dismissed upon motion of the State. State v. Harris, 199 N.C. 377, 154 S.E. 628 (1930).

Rule 22

Mandamus and Prohibition

(a) **Petition for Writ; to Which Appellate Court Addressed.** Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) **Response; Determination by Court.** Within 10 days after service upon him of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary:

General. Presumably because of the essentially liberal and flexible formula for determining appealability of interlocutory orders found in G.S. § 1-277, an extensive use of mandamus and prohibition to review such orders has not developed in our practice. Nevertheless, there are interlocutory orders from which appeal of right is held not to lie even under this formula. And in particular cases there may be need for immediate review of such orders to permit the affected party effectively to continue, such as discovery orders denying access to material deemed essential by the party. See, e.g., *Carolina Overall Corp. v. East Carolina Linen Supply, Inc.*, 1 N.C. App. 318 (1968) for such a possibility. Here mandamus and prohibition have traditionally provided an available means of review, particularly in systems such as the federal with fairly rigid "final judgment" constraints on appealability, and may be useful in our practice under such occasional circumstances as those above suggested. On occasion it would appear that certiorari has been used in circumstances where mandamus or prohibition would have been more appropriate (though they come eventually to the same thing, it must be admitted). See, e.g., *Brice v. Salvage Co.*, 249 N.C. 74 (1958).

The functions of mandamus and prohibition are similar and may well be interchangeable. (In jurisdictions where they have widespread usage it is common to petition for a "writ of mandamus or, alternatively, prohibition"). However, they have traditionally served different functions and are strictly appropriate for different situations. Mandamus lies most appropriately to compel a judicial action erroneously refused, or to correct judicial action erroneously taken, or to compel the exercise of judicial discretionary action when the taking of any action has been refused. Prohibition lies most appropriately to prohibit the impending exercise of jurisdiction not possessed by the judge to whom issuance of the writ has been sought.

Mandamus by appellate writ under this rule is to be distinguished from that procedure (now abolished) by which under former G.S. §§ 1-511 et seq. a "civil action in the nature of mandamus" was available as an original proceeding in the superior courts to compel the performance of purely ministerial duty by a public official. That office is now performed by a straightforward civil action for injunctive relief against the official.

Subdivision (a). As indicated, the petition for mandamus and prohibition is technically against the judicial officer sought to be controlled in respect of judicial action taken or refused, and is in form an original proceeding against him. On the rare occasions that prohibition has been used in our practice, in recent times at least, it seems clear that this traditional form has not been observed. See, e.g., *State of N.C. ex rel. Payne v. Ramsey*, 262 N.C. 757 (1964). The main feature of the traditional form is the opportunity it provides for the affected judicial officer to participate directly. This feature may be important when the conduct drawn in question is alleged to contain elements of abuse of power, or to reflect a recurring pattern in similar cases. On most occasions, however, this will not be the case, and the judicial officer will simply leave the matter to be contested between the true parties in interest.

Subdivisions (b) and (c) set out the essentials of the writ practice, and conform generally to the traditional patterns of motion practice with or without direct participation of the judicial officer as technical respondent.

CASE NOTES

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

Rule 23

Supersedeas

(a) **Pending Review of Trial Tribunal Judgments and Orders.**

(1) **Application — When Appropriate.** Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Same — How and to Which Appellate Court Made.** Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except where an appeal from a superior court is initially docketed in the Supreme Court no petition will be entertained by the Supreme Court unless application has been first made to the Court of Appeals and by that court denied.

(b) **Pending Review by Supreme Court of Court of Appeals Decisions.** Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) **Petition: Filing and Service; Content.** The petition shall be filed with the clerk of the court to which application is being made, and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and by that court denied or vacated, or of facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus or prohibition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral arguments will be received or allowed unless ordered by the court upon its own initiative.

(e) **Temporary Stay.** Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. (Amended January 1, 1981.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 34(2).

Commentary.

General. This rule builds upon the bare reference to supersedeas writ practice found in former Sup. Ct. R. 34(1). It provides in these Rules the sole grounds and procedures by which an appellate court may stay enforcement or execution of the judgment of a trial tribunal pending the appellate court's review of that judgment by appeal or on application for certiorari, mandamus, or prohibition. Supersedeas by appellate court writ is a different procedure than that provided in App. R. 8 for stay by trial court order. The two rules are interrelated by appropriate cross-references.

Subdivision (a) deals only with supersedeas to stay enforcement of trial tribunal judgments. Supersedeas to stay Court of Appeals judgments is dealt with in following subdivision (b). This subdivision (a) lays down two conditions to seeking stay of enforcement of trial tribunal judgments: 1) the case must either be on appeal or the petitioner must be seeking review by one of the extraordinary writs. The procedure is thus ancillary and may not be undertaken except in conjunction with appellate review of the judgment in question; 2) there must have been a prior unsuccessful attempt to obtain or to hold an effective stay of the judgment in the trial tribunal. The procedures by which this may be attempted at that level are spelled out in App. R. 8. This latter condition may be avoided only upon an alternative one — that under the circumstances, seeking to obtain stay at the trial court level would simply be impracticable.

Subsection (2) directs the petition in all cases except death and life imprisonment cases to the Court of Appeals. Thus, a party may not appeal to the Court of Appeals and seek initially to obtain stay by supersedeas from the Supreme Court. Upon denial of the petition by the Court of Appeals, the petitioner could then turn to the Supreme Court with a petition for supersedeas to that court (rather than seeking review of that denial by appeal or discretionary review in the Supreme Court).

Subdivision (b) deals with the much more rare practice for seeking supersedeas from the Supreme Court in respect of Court of Appeals' determinations. Here again, as in petitions for supersedeas directed to trial tribunal judgments, it is required that the petition be in conjunction with an attempt to obtain review of the judgment in question by the Supreme Court. But, unlike supersedeas running to trial tribunals, there is no requirement here that stay must first have been sought in the Court of Appeals.

Subdivision (c) expands upon the procedure provided in former Sup. Ct. R. 34(2). See Committee Form 9, "Petition for Writ of Supersedeas."

Subdivision (d) expands upon the procedure provided in former Sup. Ct. R. 34(2)(3).

Subdivision (e) had no counterpart in former rules. It provides for relief comparable to that of the t.r.o. in injunction practice, for stay pending the court's determination of the base petition. By the last sentence, this may in extreme cases be issued ex parte.

CASE NOTES

Quoted in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Cited in North Carolina Fire Ins Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982); In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982).

Rule 24

Form of Papers: Copies

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

General. This applies to the practice to obtain any of the writs authorized by App. Rules 21, 22, or 23.

ARTICLE VI. GENERAL PROVISIONS

Rule 25

Dismissal for Failure to Comply with Rules

If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the docketing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise to perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions made under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chairman of the commission; or, if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N.C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-287.1; Ct. App. Rules 5, 17, 18, 50.

Commentary. This rule states a blanket authority in the appropriate courts to dismiss cases on appeal for failure to take any timely action in the appellate process, from serving proposed case on appeal to filing the record on appeal. The consequence of failing thereafter to file briefs within permitted times is dealt with separately by App. Rules 13(c) (appeals from trial tribunals), 14(d)(2) (appeals of right from Court of Appeals) and 15(g)(3) (discretionary appeals from Court of Appeals). Former practice with respect to the proper court to entertain motions to dismiss is varied slightly in this rule. Under former Sup. Ct. R. 17 a motion to dismiss for failure to make timely filing of a record on appeal was made to the appellate court in conjunction with a motion to docket the appeal. This Rule 25 simply directs the motion for any failure to take timely action to the court wherein the case is then docketed. In the instance of a record not yet filed in the appellate court with time therefor elapsed, this now means the trial tribunal. The rule also makes plain that which is merely implied in former statutes and rules: that upon motion to dismiss the court may for good cause excuse an untimely action or nonaction and permit delayed action rather than dismissing. This replaces the more complicated procedure for "redocketing" or "reinstatement" upon such a showing which was provided by former Sup. Ct. RR. 17, 18. The provisions of App. R. 27(c) for extensions of time or for the taking of action after time expired are related in an obvious way to these provisions for dismissal upon initiative of the opposing party.

Legal Periodicals. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Construction of Second Sentence. — The title and first and third sentences of this rule clearly indicate that the motions described in the second sentence are only those for failure to comply with the Rules of Appellate Procedure or with court orders requiring action to perfect the appeal. The commentary makes this interpretation even clearer. Notably absent from the commentary is any suggestion that the drafters intended to alter existing case law. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Taken out of context, the second sentence of this rule might provide the trial court with authority to dismiss interlocutory appeals. However, elementary principles of construction require that words and phrases be interpreted contextually and in harmony with the underlying purposes of the whole. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

The court lacks discretion under this rule to permit the notice of appeal to be served after the expiration of 10 days following the entry of judgment. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

The trial division possesses limited authority to dismiss appeals under this rule. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Applied in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); State v. Evans, 46 N.C. App. 327, 264 S.E.2d 766 (1980).

Stated in Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Cited in Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rule 48, Rules of Practice in the Court of Appeals of North Carolina.

For failure to docket record on appeal within the time prescribed by the rules, the appeal should be dismissed ex mero motu. State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969); State v. Garnett, 4 N.C. App. 367, 167 S.E.2d 63 (1969).

Where the record on appeal was docketed in the Court of Appeals after the expiration of the time within which the appeal could be docketed, and there was no order extending the time for docketing, the Court of Appeals ex mero motu will dismiss the appeal for failure to comply with the rules. Young v. State Farm Mut. Auto. Ins. Co., 6 N.C. App. 443, 170 S.E.2d 90 (1969).

Pursuant to this rule, an appeal will be dismissed ex mero motu for failure to docket within the time prescribed. North Carolina State Bar v. Temple, 6 N.C. App. 437, 170 S.E.2d 131 (1969), cert. denied, 397 U.S. 1023, 90 S. Ct. 1263, 25 L. Ed. 2d 532, rehearing denied, 397 U.S. 1081, 90 S. Ct. 1520, 25 L. Ed. 2d 820 (1970).

An appeal is dismissed by the Court of Appeals ex mero motu where the record on appeal is docketed more than the allowed time after the date of judgment appealed from and the record contains no order extending the time for docketing the record on appeal, an order allowing defendant additional time within which to prepare and serve the case on appeal being insufficient to extend the time for docketing the record on appeal. State v. Fulk, 7 N.C. App. 68, 171 S.E.2d 81 (1969).

A defendant's appeal to the Court of Appeals is subject to dismissal for failure to docket the record on appeal within the time allowed. State v. Bocage, 8 N.C. App. 64, 173 S.E.2d 638 (1970); State v. Brigman, 8 N.C. App. 316, 174 S.E.2d 78 (1970).

Rule 26

Filing and Service

(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that proposed records on appeal and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

(b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Form of Papers; Copies.** Papers presented to either appellate court for filing shall be letter size (8½" x 11") with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8½ x 14"). Papers shall be prepared on white paper of 16 - 20 pound substance in pica type so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. (Amended February 11, 1982; July 1, 1982; March 1, 1983; February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

General. This rule deals comprehensively with the procedures for filing and serving papers in any context where these are required by these rules. The attempt in general is to conform to parallel requirements in the N. C. Rules of Civil Procedure governing filing and service of papers in the trial courts.

Subdivision (a). The key point here is the provision that although filing may be accomplished by mailing as well as by hand delivery to the appropriate clerk's office, its timeliness is measured in either case by the time of receipt in the clerk's office.

Subdivisions (b), (c), (d). Paralleling the provisions of N.C.R.Civ.P. 5, these subdivisions provide practical, expeditious modes of accomplishing and proving required service of papers. Of particular importance is the provision in subdivision (b) making service by mail complete upon due deposit in the mails, a provision which expedites the requirement in subdivision (b) that papers be served "at or before" filing. Of importance here is the provision of App. R. 27(b) which gives any person so served by mail an additional 3 days to take required action following service.

Subdivisions (e), (f). These subdivisions are other instances of the attempt to accommodate the rules to the case involving multiple parties, and are designed to expedite conformance with the party-service requirements in the situations described. Cf. N.C.R.Civ.P. 5(c). The specification "proceeding separately" accommodates to the alternative possibility that "numerous" parties may have voluntarily joined under App. R. 5, in which case by force of App. R. 26(e) service upon one automatically is service upon all.

Editor's Note. — The 1984 amendment to this rule, approved November 27, 1984, is applicable to all appeals in which documents are filed on or after February 1, 1985.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

Requirements Jurisdictional. — The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of § 1-279, Rule 3 and this rule are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

When Papers Must Be Served. — This rule is interpreted as requiring that the papers referred to therein be served on all other parties to the appeal on the day of or before the day of filing; therefore, service of notice of appeal on plaintiff's counsel was timely where service was made by depositing the notice in the mail on the same day, though several hours later, that notice was filed with the clerk of court. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

Notice of appeal must be served on opposing party either before the notice is filed or on the same day the notice is filed. Shaw v. Hudson, 49 N.C. App. 457, 271 S.E.2d 560 (1980).

Service on Appointed Special Advocate for State. — Where, at a mental health hearing session, the State was represented by an appointed special advocate, which special advocate was present at the hearing, had knowledge of the evidence offered, and was qualified to determine for the State if the proposed record on appeal was accurate, he alone was the "attorney of record" within the meaning of this rule, and the proposed record on appeal should be served on him as special advocate rather than the Attorney General. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

Cited in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Rule 27

Computation and Extension of Time

(a) **Computation of Time.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) **Additional Time After Service by Mail.** Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) **Extensions of Time; by Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division.** All motions for extensions of time not to exceed 150 days from the date the notice of appeal is given are made to the trial tribunal from whose judgment, order, or other determination the appeal has been taken during the time prior to docketing of the appeal in the appellate division. No extension of time which runs beyond 150 days from the date the notice of appeal is given shall be granted by the trial tribunal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state; provided that motions to extend the time for serving the proposed record on appeal made after the expiration of any time previously allowed for such service must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard. Such motions may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time.

Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division.** All motions for extensions of time, including the time for filing the record on appeal, to a time greater than 150 days from the date the notice of appeal is given may only be made to the appellate court to which appeal has been taken. Any subsequent motion for any extension of time shall be made to the appellate court. (Amended March 7, 1978; January 1, 1979; February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Subd. (a) and (b): None. Subd. (c): G.S. § 1-282, Ct. App. Rules 5, 17, 18, 50.

Commentary.

Subdivisions (a) and (b). These subdivisions parallel for appellate procedure the provisions of N.C.R.Civ.P. 6(a) and (e) for trial court procedures.

Subdivision (c). As in the corollary provisions of App. R. 25 governing the procedure for dismissals for untimely action or for nonaction, this subdivision lays down a blanket authority in the appropriate courts to extend any of the critical time intervals provided in these rules, with the important exception of the times for taking appeal. The general rule stated is that such motions are made to that court wherein the action is currently docketed. An important exception to this is the provision that the outer time limit of 150 days from taking appeal to file the record on appeal provided by App. Rule 13(a) may only be extended by the appellate court to which appeal has been taken. This parallels the provision formerly in Ct. App. R. 5 that the 90-day outer limit for "docketing" a record on appeal might be extended by the appellate court.

The final paragraph of this subdivision is new and authorizes extensions of time by the trial tribunals to be made ex parte, and without prior notice, but with the requirement of post-order notice to all parties of any extension granted. While this is a liberalization of former practice, it is thought justified, in view of the matter involved, to expedite action. App. R. 36, cross-referred as the source for identifying trial division judges empowered to grant extensions of time, also liberalizes the practice by opening this to a wider range of such judges than was formerly provided by now repealed G.S. § 1-282, which limited this to "the trial judge." Again, the idea is that given the matter involved, expedition of action is the most important consideration.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

CASE NOTES

The time for taking an appeal may not be enlarged by the appellate courts. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

In calculating whether notice of appeal is timely given, the 10th day is not considered if it is a Saturday, Sunday, or legal holiday. In such case, the 10-day period runs at the end of the next day that is not a Saturday, Sunday, or legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

Appeal was dismissed where record on appeal was not filed in appellate court within 150 days from giving of notice of appeal. Appellant's motion for a new trial or a modification of the judgment pursuant to § 1A-1, Rule 59, the court's order fixing the time for service of the record on appeal, and the court's orders denying appellant's § 1A-1, Rule 59 motion did not extend the time within which the appellant was required to file the record on appeal after giving notice of appeal from the judgment. C.C. Woods Constr. Co. v. Budd-Piper Roofing Co., 46 N.C. App. 634, 265 S.E.2d 506 (1980).

Notice of Appeal Held Timely. — Notice of appeal filed on July 5, 1983, was timely, where the 10th day fell on Sunday, July 3, 1983, and the next day, July 4, 1983, was a legal holiday. Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984).

Notice Provision Contained in Rule 12 is Jurisdictional. — The provisions of N.C. App. P., Rule 12, requiring that "no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken" is jurisdictional and it imposes a limit on the aggrieved party's right to appeal. Only the appropriate appellate court can extend this 150-day time limit. State v. Ward, 61 N.C. App. 747, 301 S.E.2d 507, cert. denied, 309 N.C. 825, 310 S.E.2d 357 (1983).

Applied in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); State v. Brown, 43 N.C. App. 532, 259 S.E.2d 309 (1979); Phillips v. Texfi Indus., Inc., 44 N.C. App. 66, 259 S.E.2d 769 (1979); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980); Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981).

Stated in Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Cited in In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); State v. Locklear, 50 N.C. App. 165, 272 S.E.2d 597 (1980); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983).

Rule 28

Briefs: Function and Content

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:

(1) A table of contents and table of authorities required by Rule 26(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal, or the transcript of proceedings if one is filed pursuant to Rule 9(c)(2). Exceptions not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

(6) A short conclusion stating the precise relief sought.

(7) Identification of counsel by signature, typed name, office address and telephone number.

(8) The proof of service required by Rule 26(d).

(9) The appendix required by Rule 28(d).

(c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain a table of contents and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, or statement of the facts, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee desires to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate.

(d) **Appendixes to Briefs.** Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

(i) those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

(ii) those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

(i) whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

(ii) to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

(iii) to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required.** Appellee must reproduce appendixes to his brief in the following circumstances:

(i) Whenever the appellee believes that appellant's appendixes do not include portions of the transcript required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript he believes to be necessary to understand the question.

(ii) Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript as if he were the appellant with respect to each such new or additional question.

(4) **Format of Appendixes.** The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record.** References in the briefs to exceptions and assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) **Reply Briefs.**

(1) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 20 days after service upon him of such brief, file and serve a reply brief limited to those new or additional questions presented in the appellee's brief.

(2) Except for a reply brief filed under Rule 28(h)(1), or unless the court, upon its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court.

(i) **Amicus Curiae Briefs.** A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the appeal is docketed. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. In all cases where amicus curiae briefs are permitted by a court, the clerk of the court at the direction of the court will notify all parties of the times within which they may file reply briefs. Such reply briefs will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons. (Amended July 1, 1981; October 1, 1981; March 15, 1982; January 1, 1983; February 1, 1985.)

Drafting Committee Note

Sources and parallels in current statutes and rules: Sup. Ct. Rules 27, 27½, 28, 29.

Commentary.

General. This Rule defines the function and prescribes the form and content of *all* briefs, whether on appeals from the trial tribunals, or from the Court of Appeals to the Supreme Court. It does not deal with filing and service requirements. These appear in App. RR. 13 (appeals from trial tribunals), 14(d) (appeals of right from Court of Appeals) and 15(g) (discretionary review of Court of Appeals).

Subdivision (a). This statement of function builds upon well-established practice developed over the years. Its basic point is that the questions formally presented to the court in the briefs define the actual scope of review which has been earlier narrowed by the choice of exceptions to be brought forward in assignments of error. This serves to focus attention on the true function of assignments of error—that they serve primarily merely to alert the appellee to those portions of the record which will be relevant to consideration of the appellant's contentions on appeal. Since some of these may be abandoned, it is the questions presented in the briefs rather than the assignments of error which provide the court's direct source for consideration of error. In this light, the provisions of App. R. 10 which strip the assignment of error to a non-argumentative statement of the substance of the error suggested, with a mere reference to those exceptions set out in the body of the record upon which it is based, is justified. See Commentary to App. R. 10(c).

Subdivision (b) builds upon the more sparsely stated content requirements of former Sup. Ct. RR. 27, 27½, and 28. Subsection (2) attempts to formulate a clear standard of expectation as to the form and content of that element described as the "statement of the case." This element of the brief (confusedly denominated in many as the "statement of case on appeal") has been a frequent source of unhelpful prolixity and occasional abuse, as contested fact has been stated as established fact or in argumentative form. Against this tendency, the rule emphasizes a desire for conciseness, an outline of the essential nature of the case with its bare procedural history, and a nonargumentative statement of just so much undisputed factual background and context as will aid the court in its study of the briefs and records in light of the questions presented.

Subdivision (c). The most important provision in this subdivision is that which authorizes the formal presentation by appellees of questions for consideration by the court on a conditional basis. The conditional aspect is that in response to the appellant's brief the court will find error as assigned by the appellant. Two types of conditional questions are posited. The first must rest upon formal cross-assignment of error by the appellee, and this, per App. R. 10(d), may be based upon any error which is asserted by the appellee to have deprived him of an alternative basis for supporting his judgment. The other is already provided by N.C.R.Civ.P. 50(d) in its authorization for appellee presentation of the question (without any cross-assignment of error) whether a new trial should be awarded him as a matter of grace rather than giving judgment n.o.v. for the appellant where the court determines that the appellee's verdict is not supportable on the evidence. This provision is also important in its relationship to App. Rule 16 wherein the scope of Supreme Court review of Court of Appeals decisions is defined in terms of the questions properly raised by appellees as well as appellants in the Court of Appeals. The Commentary to that rule should be read in conjunction with this.

Subdivision (d). This in an important adjunct to the requirement in Rules 14(d)(1) and 15(g)(2) that *new* briefs be filed for Supreme Court review of Court of Appeals determinations. The compelling reason for that requirement is to force a reconsideration and possibly a restatement of the questions to be presented on this second review. See Commentary to App. R. 16. Even when a party desires to present exactly the same set of questions presented to the Court of Appeals, their restatement in the new brief will not be unduly burdensome. But restating the entire argument advanced in support of the party's position on these questions could well be. Hence this provision allows all or portions of the *argument* section in a Court of Appeals brief to be incorporated by reference in a new Supreme Court brief. This brief must nevertheless contain a reformulation or restatement of the other required elements: questions presented; statement of case (which has changed by whatever action the Court of Appeals has taken); and relief sought (which will have changed most obviously if the parties are now reversed as appellant and appellee).

Subdivision (e) carries forward traditional practice for making references in the brief to particular items or portions of the record on appeal. The specification that reference is to be made to pages of the "printed" record refers to the "work copies" as prepared by the clerk pursuant to App. RR. 12(c), 13(b), 14(d)(1), 15(g)(3). These of course will bear different pagination than does the formal record on appeal filed by the appellant, and may indeed contain fewer items by stipulation of the parties under App. R. 12(c). This of course means that final references must await preparation by the clerk of these "printed" or "work" copies, but the time intervals between filing of the formal record and the deadline for filing briefs is adequate. App. R. 13(a).

Subdivision (f). If parties have formally joined on the appeal under App. R. 5, they will of course file joint briefs. This subdivision permits joinder on brief by parties not formally joined for all purposes on an appeal.

Subdivision (g) carries forward in slightly restated form a comparable provision in former Sup. Ct. R. 27.

Subdivision (h) had no counterpart in former rules, but expresses generally understood practice. The cross-reference is to that subdivision of this Rule which gives a right to an appellant to file a reply brief in any situation where an appellee has exercised the right to present "cross-questions," the reply brief being limited to these.

Subdivision (i) had no counterpart in former rules.

Commentary on 1981 Amendment. — The North Carolina Supreme Court, in repealing subsection (d), has eliminated the right to incorporate by reference any argument contained in a brief filed in the Court of Appeals. Not only must a party include in his new brief any question which he wants to preserve as required by Rule 28(b), but now he must also present any argument for that question upon which he intends to rely. Questions not brought forward and argued in the new brief will be considered abandoned.

These amendments to Rules 9 and 28 will provide litigants with an *alternative* to the provision of Rule 9(c)(1) which requires that generally the evidence must be set out in narrative form. This alternative pertains only to the testimony given at trial. Other items necessary to the appeals, e.g., pleadings, jury instructions, judgments, etc., should be contained in the record on appeal as required by appropriate appellate rules.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984).

Under this Rule, appellate review is limited to the arguments upon which the parties rely in their briefs. Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

The proviso to App. R. 10(a) allows review of the questions, without exceptions or assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict and the judgment) but this proviso does not negate the requirement of this Rule that a question must be presented and argued in the brief in order to obtain appellate review of it. State v. Brothers, 33 N.C. App. 233, 234 S.E.2d 652, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977); Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, 454 U.S. 959, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981).

This rule requires that a question be presented and argued in the brief in order to obtain appellate review. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Questions raised by assignments of error but not presented in party's brief are deemed abandoned. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Under former Rule 28 (Rules of Practice in Court of Appeals), assignments of error not brought forward and argued in the brief are deemed abandoned. State v. Robinson, 26 N.C. App. 620, 216 S.E.2d 497 (1975).

On appeal, where defendant brings forward in his brief fewer arguments than there are assignments of error, the remaining assignments of error are deemed abandoned. State v. Ledford, 41 N.C. App. 213, 254 S.E.2d 780 (1979).

Where appellant did not bring forth exceptions to certain findings of the trial court in his brief, he was deemed to have abandoned them. Baker v. Log Systems, — N.C. App. —, 330 S.E.2d 632 (1985).

Abandonment of Issue. — Where defendant failed to argue in his brief an alleged error made by the trial court, the issue was deemed abandoned. State v. Davis, 68 N.C. App. 238, 314 S.E.2d 828 (1984).

The Court of Appeals will not "fish out" an appellate's exceptions which are not referred to by the proper printed page number. Lee v. Capitol Tire Co., 40 N.C. App. 150, 252 S.E.2d 252, cert. denied, 297 N.C. 454, 256 S.E.2d 807 (1979); S.J. Groves & Sons & Co. v. State, 50 N.C.App. 1, 273 S.E.2d 465 (1980), cert. denied, 302 N.C. 396, 279 S.E.2d 353 (1981).

The State is not required by section (c) to state the facts unless there is some disagreement. State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

Incorporating Material By Reference. — For case construing former subsection (d), repealed in 1981, see State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

Relief as Matter of Appellate Grace. — Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under § 7A-32(c) or pursuant to Appellate Rule 2, could consider on its own initiative the question of the attorney fees award and give relief as a matter of appellate grace. Stillwell Enters., Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Failure to Cite Authority Abandons Argument. — Where the defendant properly included in its brief the assignments of error and exceptions to the findings of fact from the trial court but completely failed to afford the appellate court any citations of authority or the portions of the record upon which it relied to support its argument, its argument was deemed abandoned under section (b)(3) of this Rule. S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980), cert. denied, 302 N.C. 396, 279 S.E.2d 353 (1981).

Failure to Relate Cases to Assignment of Error. — Where plaintiff, in his brief, has listed several cases but has made no attempt to relate the cases cited to his one assignment of error or to any argument advanced in support thereof, his brief is clearly not in accordance with this rule. Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784, cert. denied, 298 N.C. 294, 259 S.E.2d 910 (1979).

Where an argument in the appellant's brief did not deal with the assignment of error, it was deemed abandoned. Raleigh-Durham Airport Auth. v. King, — N.C. App. —, 330 S.E.2d 622 (1985).

Failure to refer to the assignments of error or exceptions following the statement of the questions presented could result in abandonment of all of appellant's questions on appeal and consequently result in dismissal of the appeal. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed and cert. denied, 305 N.C. 306, 290 S.E.2d 707 (1982).

Although appellant failed to identify the various exceptions upon which its assignments of errors were based, as required by subsection (b)(5) of this rule, the court deemed it appropriate, pursuant to Rule 2, to dispose of the appeal on the merits. State Employee's Credit Union, Inc. v. Gentry, — N.C. App. —, 330 S.E.2d 645 (1985).

Codefendant Deemed to Have Abandoned Assignment. — Where codefendants object to the introduction of evidence, but the assignment of error based on this exception is brought forward and discussed in the brief of only one of the codefendants, the assignment is deemed abandoned by the other codefendants.

State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

An exception to the trial judge's signing of the judgment upon verdict of guilty raises nothing for review under this rule. State v. Womble, 292 N.C. 455, 233 S.E.2d 534 (1977).

It is the better practice for the appellee's brief to use the same numbering system for the questions presented as the appellant's brief. State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

Question Not Raised at Trial or on Appeal May Not Be Attacked by Collateral Review. — Where the defendant in a prosecution for second-degree murder failed to raise at trial, on direct appeal or in a subsequent petition for post-conviction relief, the question of the trial judge's alleged error in instructing the jury that the burden was on the defendant to disprove malice to reduce the killing to voluntary manslaughter and to prove that he killed in self-defense, the defendant could not seek collateral review of the alleged error. State v. Locklear, 39 N.C. App. 671, 251 S.E.2d 638, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979) (decided under former Rule 28, Rules of Practice in the Court of Appeals of North Carolina).

Subdivision (b)(4) serves the same function that Rule 9(c)(1) serves with respect to records filed wherein the evidence is narrated; it assures that the court will have before it the evidence necessary to answer the questions presented, and that such evidence is in a condensed and readily available form. State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982).

Subdivision (b)(4) Must Be Followed When Stenographic Transcript Used. — It is imperative that defendants using the stenographic transcript alternative allowed by Rule 9(c)(1) carefully follow the requirements of subdivision (b)(4) of this rule in order that appellate courts not be left the time-consuming and burdensome task of searching through the transcript for the pertinent pages. The omission of the pertinent transcript pages requires that the transcript be circulated among all the judges on the panel, requiring each of them to go through this time-consuming and burdensome task and is grounds for dismissal of the appeal. State v. Wilson, 58 N.C. App. 818, 294 S.E.2d 780 (1982).

Failure to observe the requirements of subdivision (b)(4) of this rule constitutes a substantial impediment to the capacity of the appellate court to perform its functions. State v. Edmonds, 59 N.C. App. 359, 296 S.E.2d 802 (1982), vacated on other grounds, 308 N.C. 362, 302 S.E.2d 223, cert. denied, 309 N.C. 323, 307 S.E.2d 167 (1983); State v. Greene, 59 N.C. App. 360, 296 S.E.2d 802 (1982), cert. granted, 308 N.C. 192, 302 S.E.2d 246, rev'd, 309 N.C. 458, 306 S.E.2d 771 (1983); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982).

Only Portions of Transcript Necessary to Determine Question Need Be Set Out. — Subdivision (b)(4) of this rule only requires setting out the verbatim portions of the transcript necessary for an understanding of each question presented. The rule does not require the appellant to include all of the evidence necessary for a determination of the questions presented. State v. Nickerson, 308 N.C. 376, 302 S.E.2d 221 (1983).

Section (c) of Rule 9 provides for an alternative to narrating the evidence into the record; that is, the filing of a complete stenographic transcript with the clerk of the court in which the appeal is docketed. Whichever method is chosen (Rule 9 or 28), the result must be the same: to-wit, to provide the reviewing court with all the information necessary to understand each question presented. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

When Appendix Required. — An appendix is not contemplated for each question that requires a verbatim reproduction of a part of the transcript in order to understand that question. Instead, subdivision (b)(4) of this rule is designed to ensure that verbatim reproductions appear either in the brief itself or in an appendix to the brief. The appendix method should be employed when the question presented requires long verbatim reproductions of the transcript. Placing such reproductions in an appendix serves the dual purpose of providing the reviewing court with all the information necessary in order to make an informed determination while preserving the clarity and directness of the argument. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

This rule only requires the inclusion of the portions of the transcript necessary to understand, not decide, the question. Any other interpretation would require many appellants, especially those who question the sufficiency of the evidence, to include a verbatim copy of the entire transcript in the appendix to the brief. This interpretation should not encourage appellants to use less than due diligence in following the rules. Indeed, it is usually the safer and wiser course to do more than meet the minimum requirements. State v. Nickerson, 308 N.C. 376, 302 S.E.2d 221 (1983).

Although a complete stenographic transcript contains all the evidence in a case, it is too time consuming and too burdensome a task to expect each member of the reviewing court to search through pages of the transcript in order to find those passages necessary to the understanding of each question presented. Therefore, it is imperative that whenever a stenographic transcript is used in lieu of narrating the evidence into the record, all relevant portions of the transcript must be reproduced in either the brief or its appendix. State v. Edmonds, 308 N.C. 362, 302 S.E.2d 223 (1983).

Applied in State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Cawthorne, 290 N.C. 639, 227 S.E.2d 528 (1976); State v. Duncan, 290 N.C. 741, 228 S.E.2d 237 (1976); State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976); State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976); In re Salem, 31 N.C. App. 57, 228 S.E.2d 649 (1976); State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977); Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977); Community Bank v. McKenzie, 32 N.C. App. 68, 230 S.E.2d 788 (1977); Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977); State v. Witherspoon, 293 N.C. 321, 237 S.E.2d 822 (1977); State v. Jones, 293 N.C. 413, 238 S.E.2d 482 (1977); State v Alston, 293 N.C. 553, 238 S.E.2d 505 (1977); State v. Lockett, 33 N.C. App. 401, 235 S.E.2d 73 (1977); State v. Tuttle, 33 N.C. App. 465, 235 S.E.2d 412 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); Streeter v. Streeter, 33 N.C. App. 679, 236 S.E.2d 185 (1977); State v. Looney, 294 N.C. 1, 240 S.E.2d 612 (1978); State v. Martin, 294 N.C. 253, 240 S.E.2d 415 (1978); Burkhimer v. Coble, 35 N.C. App. 127, 239 S.E.2d 852 (1978); State v. Warren, 35 N.C. App. 468, 241 S.E.2d 854 (1978); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978); State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); Smith v. State, 36 N.C. App. 307, 244 S.E.2d 161 (1978); State v. Burke, 36 N.C. App. 577, 244 S.E.2d 477 (1978); State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Bailey, 36 N.C. App. 728, 245 S.E.2d 97 (1978); Siedlecki v. Powell, 36 N.C. App. 690, 245 S.E.2d 417 (1978); State v. Davis, 37 N.C. App. 173, 245 S.E.2d 583 (1978); Triplett v. Triplett, 37 N.C. App. 283, 245 S.E.2d 812 (1978); State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152 (1978); Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978); Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); In re Robinson, 39 N.C. App. 345, 250 S.E.2d 79 (1979); State v. Henley, 296 N.C. 547, 251 S.E.2d 463 (1979); State v. Hopkins, 296 N.C. 673, 252 S.E.2d 755 (1979); Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849 (1979); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223 (1979); State v. Hunt, 297 N.C. 258, 254 S.E.2d 591 (1979); Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979); State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979); Econo-Travel Motor Hotel Corp. v. Foreman's Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); Shirley v. Administrative Office of Courts, 44 N.C. App. 188, 260 S.E.2d 448 (1979); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980); Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980); State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980); In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980); Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 485, 269 S.E.2d 602 (1980); State v. Cohen, 301 N.C. 220, 270 S.E.2d 416 (1980); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980); United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313 (1980); State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371 (1980); Griffin v. Griffin, 45 N.C. App. 531, 263 S.E.2d 39 (1980); State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821 (1980); Spartan Equip. Co. v. Troitino & Brown, Inc., 46 N.C. App. 343, 264 S.E.2d 759 (1980); Heist v. Heist, 46 N.C. App. 521, 265 S.E.2d 434 (1980); Hanes v. Kennon, 46 N.C. App. 597, 265 S.E.2d 488 (1980); Southern Nat'l Bank v. B & E Constr. Co., 46 N.C. App. 736, 266 S.E.2d 1 (1980); Lloyd v. Carnation Co., 47 N.C. App. 203, 266 S.E.2d 722 (1980); Munford v. Hutton & Bourbonnais Co., 47 N.C. App. 440, 267 S.E.2d 511 (1980); Rose v. Herring Tractor & Truck Co., 47 N.C. App. 643, 267 S.E.2d 717 (1980); State v. Harper, 50 N.C. App. 198, 272 S.E.2d 600 (1980); State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269 (1981); McNinch v. Henredon Indus., Inc., 51 N.C. App. 250, 276 S.E.2d 756 (1981); Coulbourn Lumber Co. v. Grizzard, 51 N.C. App. 561, 277 S.E.2d 95 (1981); Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981); Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27 (1981); Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); State v. Poplin, 304 N.C. 185, 282 S.E.2d 420 (1981); Shreve v. Combs, 54 N.C. App. 18, 282 S.E.2d 568 (1981);

Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981); Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); Wachovia Bank & Trust Co. v. Rubish, 306 N.C. 417, 293 S.E.2d 749 (1982); State v. Thompson, 306 N.C. 526, 294 S.E.2d 314 (1982); State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880 (1982); Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Pearson, 59 N.C. App. 87, 295 S.E.2d 499 (1982); State v. Nickerson, 59 N.C. App. 236, 296 S.E.2d 298 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); State v. Joseph, 59 N.C. App. 436, 297 S.E.2d 173 (1982); State v. Craig, 308 N.C. 446, 302 S.E.2d 740 (1983); Edwards v. Lathan, 60 N.C. App. 759, 299 S.E.2d 819 (1983); State v. Willis, 61 N.C. App. 244, 300 S.E.2d 829 (1983); State v. Gonzalez, 62 N.C. App. 146, 302 S.E.2d 463 (1983); First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983); Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983); State v. Green, 309 N.C. 623, 308 S.E.2d 326 (1983); State v. Collins, 64 N.C. App. 656, 308 S.E.2d 353 (1983); Martin v. Petroleum Tank Serv., 65 N.C. App. 565, 309 S.E.2d 536 (1983); Wall v. Stout, 310 N.C. 184, 311 S.E.2d 571 (1984); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984); Taylor v. Gillespie, 66 N.C. App. 302, 311 S.E.2d 362 (1984); Chrysler Credit Corp. v. Rebhan, 66 N.C. App. 255, 311 S.E.2d 606 (1984); Faught v. Faught, 67 N.C. App. 37, 312 S.E.2d 504 (1984); Smith-Douglass, Div. of Borden Chem., Borden, Inc. v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984); Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984); Miller v. Henderson, 71 N.C. App. 366, 322 S.E.2d 594 (1984); In re Will of Leonard, 71 N.C. App. 714, 323 S.E.2d 377 (1984); Goforth Properties, Inc. v. Town of Chapel Hill, 71 N.C. App. 771, 323 S.E.2d 427 (1984); Doby v. Lowder, 72 N.C. App. 22, 324 S.E.2d 26 (1984); Pittman v. First Protection Life Ins. Co., 72 N.C. App. 428, 325 S.E.2d 287 (1985); Sperry Corp. v. Patterson, 73 N.C. App. 123, 325 S.E.2d 642 (1985); State v. Castleberry, 73 N.C. App. 420, 326 S.E.2d 312 (1985); Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51 (1985); Little v. Little, — N.C. App. —, 327 S.E.2d 283 (1985); In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985); Lattimore v. Fisher's Food Shoppe, Inc., — N.C. —, 329 S.E.2d 346 (1985); Watts v. Cumberland County Hosp. Sys., — N.C. App. —, 330 S.E.2d 242 (1985); Watts v. Cumberland County Hosp. Sys., — N.C. App. —, 330 S.E.2d 256 (1985); State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., — N.C. —, 332 S.E.2d 397 (1985); L. Harvey & Son Co. v. Jarman, — N.C. App. —, 333 S.E.2d 47 (1985); State v. Parker, — N.C. App. —, 333 S.E.2d 515 (1985); State v. Williams, — N.C. —, 333 S.E.2d 708 (1985); In re Parker, — N.C. App. —, 333 S.E.2d 749 (1985).

Quoted in State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978); Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871 (1981).

Stated in Steel Creek Dev. Corp. v. James, 300 N.C. 631, 268 S.E.2d 205 (1980); State v. Oliver, 52 N.C. App. 483, 279 S.E.2d 19 (1981); State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981); State v. Jacobs, 57 N.C. App. 537, 291 S.E.2d 804 (1982); State v. Dellinger, 308 N.C. 288, 302 S.E.2d 194 (1983); State v. Nickerson, 62 N.C. App. 754, 303 S.E.2d 569 (1983); Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984); Bryant v. Nationwide Mut. Fire Ins. Co., 67 N.C. App. 616, 313 S.E.2d 803 (1984); Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670 (1984).

Cited in State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976); State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); State v. McKenna, 289 N.C. 668, 224 S.E.2d 537 (1976); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Craft, 32 N.C. App. 357, 232 S.E.2d 282 (1977); State v. Willard, 293 N.C. 394, 238 S.E.2d 509 (1977); State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977); State v. Greene, 34 N.C. App. 149, 237 S.E.2d 325 (1977); State v. McWhorter, 34 N.C. App. 462, 238 S.E.2d 639 (1977); Murphy v. Murphy, 34 N.C. App. 677, 239 S.E.2d 597 (1977); State v. Thomas, 35 N.C. App. 198, 241 S.E.2d 128 (1978); Bridger v. Mangum, 35 N.C. App. 569, 241 S.E.2d 726 (1978); North Carolina Auto. Rate Administrative Office v. Ingram, 35 N.C. App. 578, 242 S.E.2d 205 (1978); Lineberry v. Wilson, 36 N.C. 649, 244 S.E.2d 702 (1978); Bank of N.C. v. Cranfill, 37 N.C. App. 182, 245 S.E.2d 538 (1978); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); State v. Gosnell, 38 N.C. App. 679, 248 S.E.2d 756 (1978); State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979); Reliance Ins. Co. v. North Carolina Nat'l Bank, 39 N.C. App. 420, 250 S.E.2d 699 (1979); Tanglewood Land Co. v. Wood, 40 N.C. App. 133, 252 S.E.2d 546 (1979); State v. Sealey, 41 N.C. App. 175, 254 S.E.2d 238 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Williams, 300 N.C. 190, 265 S.E.2d 215 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); Wright

v. Wright, 47 N.C. App. 367, 267 S.E.2d 61 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); State v. Jones, 50 N.C. App. 560, 274 S.E.2d 401 (1981); State v. Young, 302 N.C. 385, 275 S.E.2d 429 (1981); State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981); State v. Gamble, 50 N.C. App. 658, 274 S.E.2d 874 (1981); State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861 (1981); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981); Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766 (1981); State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981); State v. Melvin, 53 N.C. App. 421, 281 S.E.2d 97 (1981); State v. Luckey, 54 N.C. App. 178, 282 S.E.2d 490 (1981); State v. Locklear, 54 N.C. App. 235, 282 S.E.2d 485 (1981); Coleman v. City of Winston-Salem, 57 N.C. App. 137, 291 S.E.2d 155 (1982); State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982); State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); In re Huber, 57 N.C. App. 453, 291 S.E.2d 916 (1982); State v. Woodrup, 60 N.C. App. 203, 298 S.E.2d 439 (1983); In re Webb, 60 N.C. App. 410, 299 S.E.2d 240 (1983); McManus v. Gambill, 60 N.C. App. 600, 299 S.E.2d 479 (1983); Carter v. Parsons, 61 N.C. App. 412, 301 S.E.2d 405 (1983); Spencer v. Spencer, 61 N.C. App. 535, 301 S.E.2d 411 (1983); State v. Jones, 63 N.C. App. 411, 305 S.E.2d 221 (1983); Curl ex rel. Curl v. Key, 64 N.C. App. 139, 306 S.E.2d 818 (1983); Brown v. North Carolina Wesleyan College, Inc., 65 N.C. App. 579, 309 S.E.2d 701 (1983); State v. Kelley, 65 N.C. App. 159, 308 S.E.2d 720 (1983); Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 310 S.E.2d 338 (1984); Warren v. Joseph Harris Co., 67 N.C. App. 686, 313 S.E.2d 901 (1984); In re Barefoot, 67 N.C. App. 712, 313 S.E.2d 924 (1984); Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984); Alexander v. Alexander, 68 N.C. App. 548, 315 S.E.2d 772 (1984); Foy v. Foy, 69 N.C. App. 213, 316 S.E.2d 315 (1984); State v. Welch, 69 N.C. App. 668, 318 S.E.2d 4 (1984); Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984); Square D. Co. v. C.J. Kern Contractors, 70 N.C. App. 30, 318 S.E.2d 527 (1984); State v. Beam, 70 N.C. App. 181, 319 S.E.2d 616 (1984); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984); Stanley v. Nationwide Mut. Ins. Co., 71 N.C. App. 266, 321 S.E.2d 920 (1984); Warmack v. Cooke, 71 N.C. App. 548, 322 S.E.2d 804 (1984); Yassoo Enters., Inc. v. North Carolina Joint Underwriting Ass'n, 73 N.C. App. 52, 325 S.E.2d 677 (1985); Raleigh-Durham Airport Auth. v. King, — N.C. App. —, 330 S.E.2d 622 (1985).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rules 27 and 28, Rules of Practice in the Supreme Court of North Carolina, and under former Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

Rules Mandatory. — The rules of practice of the Supreme Court are mandatory. Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963).

A failure to comply with this rule results in a failure to present for review the questions sought to be presented. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

Brief Not in Accordance with Rules. — An appeal will be dismissed where there is a failure to print the record and briefs in accordance with the rules of the Supreme Court. Bradshaw v. Standsberry, 164 N.C. 356, 79 S.E. 302 (1913).

Failure to File in Time. — Where appellant fails to file his brief within the time prescribed, and the case on appeal contains no assignments of error or grouped exceptions, as required by the rules of the Supreme Court, a motion by appellee to dismiss will be granted. Rosemond v. McPherson, 156 N.C. 593, 72 S.E. 570 (1911); In re Bailey, 180 N.C. 30, 103 S.E. 896 (1920).

Where an appellant knows that his brief must be prepared, printed, and filed by noon of a certain day, and he takes no steps to this end, a motion to dismiss the appeal will be granted. Truelove v. Norris, 152 N.C. 755, 67 S.E. 487 (1910).

Late filing of appellant's brief works an abandonment of the assignments of error, except those appearing on the face of the record, which are cognizable ex mero motu. State v. Lynn, 251 N.C. 703, 111 S.E.2d 866 (1960).

When Cause Docketed Too Late for Hearing. — Where a cause was docketed too late for hearing at a term of the Supreme Court, a motion to dismiss for failure to file printed briefs must be denied. Gupton v. Sledge, 161 N.C. 213, 76 S.E. 527 (1912); Bumgarner v. Thornton Light & Power Co., — N.C. —, 76 S.E. 528 (1912); McLean v. McDonald, 175 N.C. 418, 95 S.E. 769 (1918).

When No Brief Filed. — Where the appellant has not filed a brief in the Supreme Court, under the rule the judgment appealed from will be affirmed on appellee's motion, if upon examination of the records proper no error appears. Rowe v. Campbell, — N.C. —, 76 S.E. 474 (1912); Board of Comm'rs v. R.S. Dickson & Co., 190 N.C. 330, 129 S.E. 726 (1925).

Where an appellant failed to file a brief in the Supreme Court, as required by this rule, upon motion of the Attorney General the appeal of the appellant was held properly dismissed. State v. Kinyon, 210 N.C. 294, 186 S.E. 368 (1936); State v. Pelley, 222 N.C. 684, 24 S.E.2d 635 (1943).

The failure to file a brief as required by this rule works an abandonment of the assignments of error, except those appearing upon the face of the record, which are cognizable ex mero motu. Dillard v. Brown, 233 N.C. 551, 64 S.E.2d 843 (1951); Land v. Land, 4 N.C. App. 115, 165 S.E.2d 692 (1969).

Where appellant does not file a brief, his appeal will be dismissed. Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947).

Appellant's exceptions and assignments of error are deemed abandoned where appellant fails to file a brief as required by this rule. In re Maxwell, 7 N.C. App. 59, 171 S.E.2d 20 (1969).

An appeal is subject to dismissal for failure of claimants to file their brief within the time allowed by the rules of the Court of Appeals. Fetherbay v. Sharpe Motor Lines, 8 N.C. App. 58, 173 S.E.2d 589 (1970).

In Capital Felony Cases. — An appeal will be dismissed upon motion of the Attorney General for failure of defendant to file a brief, but when defendant has been convicted of a capital felony, this will be done only after a careful examination of the record fails to disclose material defect. State v. Peele, 220 N.C. 83, 16 S.E.2d 449 (1941); State v. Sturdivant, 220 N.C. 535, 17 S.E.2d 661 (1941).

Although exceptions, in support of which no reason or argument is stated or authority cited, will be taken as abandoned in accordance with the provisions of this rule, nevertheless in the case of a capital felony, the Supreme Court will examine the matters to which those exceptions relate in its search for prejudicial error. State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952).

Briefs which merely state with reference to the exceptions taken of record, "Exceptions No. 1. This question and answer are incompetent," etc., afford no assistance to the court. They are merely pass briefs, and do not conform to the rules. Jones v. Southern Ry., 164 N.C. 392, 80 S.E. 408 (1913); State v. Gibson, 221 N.C. 252, 20 S.E.2d 51 (1942).

Exceptions Not Discussed Deemed Abandoned. — It is necessary that exceptions appearing in the record on appeal be mentioned in appellant's brief, with reason or argument to support them, to entitle them to be considered by the court, for otherwise they are taken as abandoned. Gray v. Cartwright, 174 N.C. 49, 93 S.E. 432 (1917); State v. Barnhill, 186 N.C. 446, 119 S.E. 894 (1923); Austin v. Crisp, 186 N.C. 616, 120 S.E. 199 (1923); In re Will of Fuller, 189 N.C. 509, 127 S.E. 549 (1925); Hyatt v. McCoy, 194 N.C. 760, 140 S.E. 807 (1927); Ludford v. Combs, 195 N.C. 851, 141 S.E. 541 (1928); Grant v. Tallassee Power Co., 196 N.C. 617, 146 S.E. 531 (1929); Andrews Music Store v. Boone, 197 N.C. 174, 148 S.E. 39 (1929); State v. Wells, 209 N.C. 358, 183 S.E. 282 (1936); Stephenson v. Honeycutt, 209 N.C. 701, 184 S.E. 482 (1936); Sparks v. Holland, 209 N.C. 705, 184 S.E. 552 (1936); Hicks v. Nivens, 210 N.C. 44, 185 S.E. 469 (1936); Taylor v. Rierson, 210 N.C. 185, 185 S.E. 627 (1936); Texas Co. v. City of Elizabeth City, 210 N.C. 454, 187 S.E. 551 (1936); State v. Tate, 210 N.C. 613, 188 S.E. 91 (1936); Wilson v. Williams, 215 N.C. 407, 2 S.E.2d 19 (1939); In re Escoffery, 216 N.C. 19, 3 S.E.2d 425 (1939); State v. Cox, 217 N.C. 177, 7 S.E.2d 473 (1940); Rose v. Bank of Wadesboro, 217 N.C. 600, 9 S.E.2d 2 (1940); State v. Howley, 220 N.C. 113, 16 S.E.2d 705 (1941); Bank of Pilot Mt. v. Snow, 221 N.C. 14, 18 S.E.2d 711 (1942); State v. Gibson, 221 N.C. 252, 20 S.E.2d 51 (1942); Brown v. Ward, 221 N.C. 344, 20 S.E.2d 324 (1942); Moyle v. Hopkins, 222 N.C. 33, 21 S.E.2d 826 (1942); Amick v. Coble, 222 N.C. 484, 23 S.E.2d 854 (1943); Wingler v. Miller, 223 N.C. 15, 25 S.E.2d 160 (1943); State v. Hunt, 223 N.C. 173, 25 S.E.2d 598 (1943); State v. Smith, 223 N.C. 457, 27 S.E.2d 114 (1943); Gillis v. Great Atl. & Pac. Tea Co., 223 N.C. 470, 27 S.E.2d 283 (1943); State v. Epps, 223 N.C. 741, 28 S.E.2d 219 (1943); Hopkins v. Colonial Stores, Inc., 224 N.C. 137, 29 S.E.2d 455 (1944); Merchant v. Lassiter, 224 N.C. 343, 30 S.E.2d 217 (1944); State v. Thompson, 224 N.C. 661, 32 S.E.2d 24 (1944); State v. Hill, 225 N.C. 74, 33 S.E.2d 470 (1945); State v. Britt, 225 N.C. 364, 34 S.E.2d 408 (1945); Troitino v. Goodman, 225 N.C. 406, 35 S.E.2d 277 (1945); State v. Hightower, 226 N.C. 62, 36 S.E.2d 649 (1946); State v. Stone, 226 N.C. 97, 36 S.E.2d 704 (1946); State v. Hart, 226 N.C. 200, 37 S.E.2d 487 (1946); Clark v. Cagle, 226 N.C. 230, 37 S.E.2d 672 (1946); State v. Carroll, 226 N.C. 237, 37 S.E.2d 688 (1946); State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946); State v. Cogdale, 227 N.C. 59, 40 S.E.2d 467 (1946); State v. Jones, 227 N.C. 94, 40 S.E.2d 700 (1946); State v. Fairley, 227 N.C. 134, 41 S.E.2d 88 (1947); Bell v. Brown, 227 N.C. 319, 42 S.E.2d 92 (1947); Randle v. Grady, 228 N.C. 159, 45 S.E.2d 35 (1947); State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947); Penny v. Stone, 228 N.C. 295, 45 S.E.2d 362 (1947); State v. Frye, 229 N.C. 581, 50 S.E.2d 895 (1948); State v. Muse, 230 N.C. 495, 53 S.E.2d 529 (1949); State v. Reid, 230 N.C. 561, 53 S.E.2d 849, cert. denied, 338 U.S. 876, 70 S. Ct. 138, 94 L. Ed. 539 (1949); Williams v. Williams, 231 N.C. 33, 56 S.E.2d 20 (1949); State v. Wiggins, 232 N.C. 619, 61 S.E.2d 611 (1950); Weaver v. Morgan, 232 N.C. 642, 61 S.E.2d 916 (1950); State v. Brown, 233 N.C. 202, 63

S.E.2d 99 (1951); State v. Avery, 236 N.C. 276, 72 S.E.2d 670 (1952); Edgewood Knoll Apts. v. Braswell, 239 N.C. 560, 80 S.E.2d 653, rehearing denied and appeal dismissed, 240 N.C. 760, 83 S.E.2d 797 (1954); Reynolds v. Earley, 241 N.C. 521, 85 S.E.2d 904 (1955); State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955); State v. Faulkner, 241 N.C. 609, 86 S.E.2d 81 (1955); Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 86 S.E.2d 745 (1955); Ammons v. Layton, 242 N.C. 122, 86 S.E.2d 915 (1955); Rhodes v. Raxter, 242 N.C. 206, 87 S.E.2d 265 (1955); State v. Atkins, 242 N.C. 294, 87 S.E.2d 507 (1955); Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955); Ford v. Blythe Bros. Co., 242 N.C. 347, 87 S.E.2d 879 (1955); Hatcher v. Clayton, 242 N.C. 450, 88 S.E.2d 104 (1955); Elliott v. Killian, 242 N.C. 471, 87 S.E.2d 903 (1955); State v. Thomas, 244 N.C. 212, 93 S.E.2d 63 (1956); Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957); J.A. Jones Constr. Co. v. Local 755, 246 N.C. 481, 98 S.E.2d 852 (1957); In re Will of Knight, 250 N.C. 634, 109 S.E.2d 470 (1959); State v. Newton, 251 N.C. 151, 110 S.E.2d 810 (1959); Henderson Cotton Mills v. Local 584, 251 N.C. 234, 111 S.E.2d 476 (1959); Henderson Cotton Mills v. Local 584, 251 N.C. 240, 111 S.E.2d 471 (1959); State v. Rose, 251 N.C. 281, 111 S.E.2d 311 (1959); Evans v. Queen City Coach Co., 251 N.C. 324, 111 S.E.2d 187 (1959); Friday v. Adams, 251 N.C. 540, 111 S.E.2d 893 (1960); State v. Coleman, 253 N.C. 799, 117 S.E.2d 742 (1961); State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961); State v. Williams, 255 N.C. 82, 120 S.E.2d 442 (1961); State v. Coffey, 255 N.C. 293, 121 S.E.2d 736 (1961); Little v. Power Brake Co., 255 N.C. 451, 121 S.E.2d 889 (1961); State v. Hart, 256 N.C. 645, 124 S.E.2d 816 (1962); State v. Pearson, 258 N.C. 188, 128 S.E.2d 251 (1962); Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); State v. Woolard, 260 N.C. 133, 132 S.E.2d 364 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Textile Motor Freight v. DuBose, 260 N.C. 497, 133 S.E.2d 129 (1963); White v. Cothran, 260 N.C. 510, 133 S.E.2d 132 (1963); State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964); State v. Anderson, 263 N.C. 124, 139 S.E.2d 6 (1964); State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); Young v. Lowie, 265 N.C. 456, 144 S.E.2d 204 (1965); Martin v. Underhill, 265 N.C. 669, 144 S.E.2d 872 (1965); State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966); Moore v. New York Life Ins. Co., 266 N.C. 440, 146 S.E.2d 492 (1966); State v. Stafford, 267 N.C. 201, 147 S.E.2d 925 (1966); Long v. Thompson, 267 N.C. 310, 148 S.E.2d 127 (1966); Mathis v. Siskin, 268 N.C. 119, 150 S.E.2d 24 (1966); State v. Majors, 268 N.C. 146, 150 S.E.2d 35 (1966); McDonald v. Moore Sheet Metal & Heating Co., 268 N.C. 496, 151 S.E.2d 27 (1966); Pendergrass v. Massengill, 269 N.C. 364, 152 S.E.2d 657 (1967); Chalmers v. Womack, 269 N.C. 433, 152 S.E.2d 505 (1967); State v. Withers, 271 N.C. 364, 156 S.E.2d 733 (1967); State v. Feaganes, 272 N.C. 246, 158 S.E.2d 89 (1967); King Homes, Inc. v. Bryson, 273 N.C. 84, 159 S.E.2d 329 (1968); State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968), cert. denied, 393 U.S. 1042, 89 S. Ct. 669, 21 L. Ed. 2d 590 (1969); Freeman v. City of Charlotte, 373 N.C. 113, 159 S.E.2d 327 (1968); Somerset v. Somerset, 3 N.C. App. 473, 165 S.E.2d 33 (1969); State v. Pulley, 5 N.C. App. 285, 168 S.E.2d 62 (1969); State v. Johnson, 5 N.C. App. 469, 168 S.E.2d 709 (1969); State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970); State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970); State v. Kirby, 7 N.C. App. 366, 172 S.E.2d 93 (1970); State v. Brown, 7 N.C. App. 372, 172 S.E.2d 99 (1970); State v. Gaiten, 8 N.C. App. 66, 173 S.E.2d 646, aff'd, 277 N.C. 236, 176 S.E.2d 778 (1970); In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971); State v. Norman, 8 N.C. App. 239, 174 S.E.2d 41 (1970).

In the absence of a showing, by statement of reason or argument or citation of authority, that the statute of limitations pleaded is relevant as a defense, error in striking this defense did not appear. Dunn v. Dunn, 242 N.C. 234, 87 S.E.2d 308 (1955).

Mere reference to exceptions of record made in the brief, without argument or citation of authority, is not a compliance with this rule. Ingle v. Southern Ry., 167 N.C. 636, 83 S.E. 744 (1914).

Exceptions and assignments of error not brought forward in the brief are deemed abandoned. Reliable Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951); Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Smith v. Simpson, 260 N.C. 601, 133 S.E.2d 474 (1963); Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964); Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Martin v. Underhill, 265 N.C. 669, 144 S.E.2d 872 (1965); State v. Covington, 267 N.C. 292, 148 S.E.2d 138 (1966); Branch v. State, 269 N.C. 642, 153 S.E.2d 343 (1967); State v. Battle, 271 N.C. 594, 157 S.E.2d 14 (1967); State v. Wyatt, 271 N.C. 596, 157 S.E.2d 96 (1967); State v. Pardon, 272 N.C. 72, 157 S.E.2d 698 (1967); State v. Williams, 272 N.C. 273, 158 S.E.2d 85 (1967); State v. Davis, 272 N.C. 469, 158 S.E.2d 630 (1968); Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968); Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968); State v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968); Goldston v. Lynch, 2 N.C. App. 291, 163 S.E.2d 26 (1968); State v.

Bass, 5 N.C. App. 429, 168 S.E.2d 424 (1969); Brantley v. Sawyer, 5 N.C. App. 557, 169 S.E.2d 55 (1969); State v. Paschal, 6 N.C. App. 334, 170 S.E.2d 95 (1969); State v. Clontz, 6 N.C. App. 587, 170 S.E.2d 624 (1969); State v. Corn, 6 N.C. App. 613, 170 S.E.2d 544 (1969); Atkins v. Parker, 7 N.C. App. 446, 173 S.E.2d 38 (1970); Moody v. Lundy Packing Co., 7 N.C. App. 463, 172 S.E.2d 905 (1970); Tickle v. Standard Insulating Co., 8 N.C. App. 5, 173 S.E.2d 491 (1970); State v. Tipton, 8 N.C. App. 53, 173 S.E.2d 527 (1970); State v. Chisholm, 8 N.C. App. 80, 173 S.E.2d 635 (1970); State v. Jordan, 8 N.C. App. 203, 174 S.E.2d 112, aff'd, 277 N.C. 341, 177 S.E.2d 289 (1970); State v. Eaton, 8 N.C. App. 321, 174 S.E.2d 24 (1970).

Exceptions set out in the record, and not preserved as required by this rule, are to be considered as abandoned. Higgins v. Higgins, 223 N.C. 453, 27 S.E.2d 128 (1943).

Statements made in appellant's brief, that he has ten assignments of error and insists upon them all, do not come within this rule, and they will not be considered; the requirements being that there must be some reason or argument in their support set out in the brief. Watkins v. Lawson, 166 N.C. 216, 81 S.E. 623 (1914).

Assignments of Error. — The purported assignments of error will not be considered by the court where they do not throw the slightest light on the questions the court is asked to pass upon and do not comply with this rule. Tillis v. Calvine Cotton Mills, Inc., 244 N.C. 587, 94 S.E.2d 600 (1956).

Where the record and brief contain no assignments of error as required by this rule, only the face of the record proper is presented for review. Bumgarner & Bowman Bldg., Inc. v. Hollar, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

An appeal is subject to dismissal where both the record on appeal and the appellant's brief contain no assignments of error but list or refer only to the exceptions. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Where briefs do not contain the exceptions and assignments of error, properly numbered, with references to the printed record, they do not conform to the rules. It is impossible to determine just what exceptions or assignments of error are referred to. State v. Newton, 207 N.C. 323, 177 S.E. 184 (1934).

Defendant's brief should designate the assignments of error discussed by number with reference to the printed pages of the transcript, and authorities relied on should be classified under each of the assignments. State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941).

Effect of Failure to Set Forth Exceptions and Assignments of Error. — The exceptions and assignments of error were not set forth in defendant appellant's brief. This is tantamount to the admission that the evidence was sufficient to be submitted to the jury. State v. Walls, 211 N.C. 487, 191 S.E. 232, appeal dismissed and cert. denied, 302 U.S. 635, 58 S. Ct. 18, 82 L. Ed. 494 (1937).

A broadside reference to the errors assigned by counsel does not conform with this rule. Seibold v. Mutual Benefit Health & Accident Ass'n, 8 N.C. App. 277, 174 S.E.2d 25 (1970).

Exception Too General. — An exception simply to the general failure of the judge to state in a plain and correct manner the evidence and declare and explain the law arising thereon is too general and cannot be sustained. Ellis v. Wellons, 224 N.C. 269, 29 S.E.2d 884 (1944).

Question Discussed in Oral Argument. — A question on oral argument, but not embraced in the assignments of error referred to in the brief, will not be considered. Mitchem v. Mitchem, 169 N.C. 48, 85 S.E. 146 (1915).

Statement of Case. — A fair and succinct statement of the case should be made at the beginning of the brief, so that the Supreme Court may understand the issues and more expeditiously hear the argument and decide the case. Balfour Quarry Co. v. West Constr. Co., 151 N.C. 345, 66 S.E. 217 (1909).

Strict Numerical Order Not Essential. — It is not essential that the assignments of error be argued in the brief in strict numerical order, but certainly counsel should indicate which assignment of error he proposes that the argument supports. In re Will of Head, 1 N.C. App. 575, 162 S.E.2d 137 (1968).

Citation of Cases. — The grouping of cases cited in a brief does not authorize the use of the names of such cases throughout the brief without giving the citation of such cases. Weaver v. Morgan, 232 N.C. 642, 61 S.E.2d 916 (1950).

Failure to Furnish Appellee with Copy of Brief. — The appellee may not successfully move in the Supreme Court to have the case dismissed for the failure of the appellant to furnish him a copy of his briefs when the brief was duly filed with the clerk under the rule, and he could have obtained one in the time prescribed by applying to the clerk, who is not under duty to either notify him or supply him a copy except at his request. Turnage v. Dunn, 196 N.C. 105, 144 S.E. 521 (1928).

When Appellant Must Discuss Appellees' Exceptions. — On an appeal from an order of a trial judge setting aside a verdict of the jury in favor of the plaintiff because of error committed against the defendant, the brief of appellant must refer to exceptions taken by defendant. Powers v. City of Wilmington, 177 N.C. 361, 99 S.E. 102 (1919).

Rule 29

Sessions of Courts; Calendar for Hearings

(a) **Sessions of Court.**

(1) **Supreme Court.** The Supreme Court shall be in continuous session for the transaction of business. Hearings in appeals will be held generally during the week beginning the Monday following the first Tuesday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.**

Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or of the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar. When a reply brief is allowed by rule or ordered by the Court, the appeal will be calendared or re-calendared for hearing at a time not less than 10 days after the time for filing the reply brief. (Amended March 3, 1982.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 1, 4, 5, 6, 7, 8, 9, 45; Ct. App. R. 1.

Commentary.

Subdivision (a) carries forward, with a minor modification to be noted, the provisions of former rules of both appellate courts regarding their respective terms and sittings.

Subsection (1) retains the Supreme Court's traditional Spring and Fall Terms of Court, from former Sup. Ct. R. 1. It abandons the stated hours for sitting during these terms which were provided in superseded Sup. Ct. R. 45. The last sentence substitutes for this scheduling procedure which does not specify particular hours of sitting.

Subsection (2) retains, from superseded Ct. App. R. 1, that Court's maintenance of a continuous term, with sittings of the panels for hearings being controlled by administrative action of the Chief Judge in accordance with published schedules.

Subdivision (b) consummates abandonment of the "district call" mode of calendaring cases for hearing in both appellate courts. As indicated, cases are now calendared without regard to their districts of origin, and generally instead on the basis of their order of docketing. The provision in the fourth sentence for a minimum of 30 days between filing of appellant's brief and the hearing of argument gives a leeway of at least 10 days between the filing of appellee's brief and the oral argument in appeals from the trial tribunals, App. R. 13(a); and a minimum of 15 days between the filing of appellee's brief and the time of oral argument in appeals from the Court of Appeals, App. RR. 14(d)(1), and 15(g)(2).

CASE NOTES

I. Decisions Under Prior Law.

I. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rule 13, Rules of Practice in the Supreme Court of North Carolina.

Title to Public Office. — Where an action involving title to public office is begun after the term of the Supreme Court, and on appeal has come to such term of the Supreme Court after the call of the district to which the cause belongs, the court can, under this rule, set the same down for argument, though it was not entitled to be heard as of right. Caldwell v. Wilson, 121 N.C. 423, 28 S.E. 363 (1897).

Enjoining Issue of County Bonds. — An injunction suit to restrain a county from issuing bonds for the payment of certain county indebtedness will not be advanced for hearing because a certain portion of such indebtedness is due to the board of education for borrowed money. Black v. Commissioners of Buncombe County, 129 N.C. 121, 39 S.E. 818 (1901).

Rule 30

Oral Argument

(a) **Order and Content of Argument.** The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(b) **Time Allowed for Argument.**

(1) **In General.** Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited. Counsel is not obliged to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

(2) **Numerous Counsel.** Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) **Non-Appearance of Parties.** If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) **Submission on Written Briefs.** By agreement of the parties, a case may be submitted for decision on the written briefs; but the court may nevertheless order oral argument prior to deciding the case.

(e) **Decision of Appeal Without Publication of an Opinion.**

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion on every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) Decisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports.

(3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

(f) **Pre-Argument Review; Decision of Appeal Without Oral Argument.**

(1) At anytime that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument. (Amended December 18, 1975; May 3, 1976; February 5, 1979; July 1, 1981.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 10, 15, 30.

Commentary.

Subdivision (a). The first sentence carries forward traditional practice as provided in former Sup. Ct. R. 30(1). The second sentence carries forward traditional practice as provided in former Sup. Ct. R. 30(2), in its requirement that appellant include a statement of the case in his opening argument. However, as appears in subdivision (b), this rule does not give him automatically an additional 10 minutes (over appellee's time) to devote to this. The last sentence of this subdivision (a) is new and its purpose is to encourage proper utilization of the oral argument as a complementary, not merely repetitive, device to the argument in written brief.

Subdivision (b) builds upon the less detailed provisions of former Sup. Ct. R. 30(2), (3), and (4) which controlled the allocation of times for arguments. As indicated in the Commentary to subdivision (a) the basic times allocated by the rule are varied to cut back the appellant's time to parity of 30 minutes with that given appellee. If appellant considers that his duty to state the case justifies an extension in the particular case, he may request it. The specific identification of adverse interests between co-parties as a possible basis for extending the basic time of 30 minutes given to all of them simply recognizes that this is probably the most frequent basis upon which extensions may justly be sought. The penultimate sentence is drawn from former Sup. Ct. R. 30(4). The last sentence is new as a direct statement but has certainly been implicit in the practice under former rules.

Subsection (2) restates without substantive change the provisions of former Sup. Ct. R. 30(5).

Subdivision (c) supplants former Sup. Ct. R. 15 in dealing with the problem of non-appearance at oral argument. The former rule dealt more broadly with failures to "prosecute" in general, presumably including non-appearance at the hearing set for oral argument.

Subdivision (d) carries forward in restated form but without substantive change the provisions of former Sup. Ct. R. 10.

Commentary on 1981 amendment. — Rule 30(f) now provides that the Court of Appeals may dispense with oral arguments in certain cases. This amendment merely extends the rule to cases heard by the Supreme Court.

CASE NOTES

Cited in In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980); State v. McGraw, 306 N.C. 372, 293 S.E.2d 161 (1982); State v. Bates, — N.C. —, 330 S.E.2d 204 (1985).

Rule 31

Petition for Rehearing

(a) **Time for Filing; Content.** A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed.** A petition to the Supreme Court shall be addressed to the court. Two copies thereof shall be filed with the clerk.

A petition to the Court of Appeals shall be addressed to the court. Two copies thereof shall be filed with the clerk.

(c) **How Determined.** Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) **Procedure When Granted.** Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted, and if the court has ordered oral argument, shall give notice of the time set therefor, which time shall be not less than 30 days from the date of such notice. The case will be reconsidered solely upon the record on appeal, the petition to rehear, and new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 10 days after the clerk has given notice of the grant of the petition; and the opposing party's brief, within 20 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13.

(e) **Stay of Execution.** When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) **Waiver by Appeal from Court of Appeals.** The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases.** The courts will not entertain petitions for rehearing in criminal actions. (Amended February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 44.

Commentary.

General. Traditional practice in this relatively seldom invoked procedure has been fairly complex and burdensome, featuring the requirement that a petition to be considered at all must be supported by the certificates of two disinterested attorneys that each considers the court's decision in error, and the direction of the petition to specific (non-dissenting) members of the court rather than to the court itself, with these members then acting for the court in respect of the grant or denial of the petition. The first of these features is retained in this new rule; the latter is completely changed.

Subdivision (a) shortens the time for filing a petition from 40 days under former Sup. Ct. R. 44(1) to 20 days. It carries forward, in restated form but unchanged in substance, the provisions as to content and the attorney certificate requirement of former Sup. Ct. R. 44(2).

Subdivision (b) involves a complete change from the former practice by which the petition was addressed to specific members of the court who then determined for the court, and without further recourse to the court, whether the rehearing should be allowed. Under this subdivision (b) the petition is directed to the appropriate court. The manner in which the court will then determine whether to grant the rehearing is not spelled out and is left to administrative determination of the particular court.

Subdivision (c) accommodates to the new provision for court determination of the petition rather than specific member determination which is embodied in subdivision (b). The time for determination by the court after filing of the petition is the same 30 days provided in former Sup. Ct. R. 44(4) for determination by the court members to whom the petition was directed after it was delivered to them. The second sentence restates more explicitly the provisions in former Sup. Ct. R. 44(1), (5) for determination to grant or deny the petition solely on the basis of the petition, without oral argument or response from the other party. The provisions for allowance as to less than all points prayed is carried forward in restated form from former Sup. Ct. R. 44.

Subdivision (d) carries forward, in restated form but unchanged in substance, the provisions of former Sup. Ct. R. 44(5) as to the matter to be considered by the court if rehearing is allowed, including the provision that oral argument will only be permitted by order of court. The provision for setting a time for oral argument if one is ordered is new. The times provided in the new rule for filing new briefs when rehearing is allowed is unchanged as to the petitioner (10 days from notice of grant) but changed as to the opposing party (from 20 days after grant of petition to 20 days after service upon him of petitioner's brief) from the provisions of former Sup. Ct. R. 44(5).

Subdivision (e) substantially changes the procedure for obtaining stay of execution of the trial court judgment upon filing of a petition for rehearing from that provided in former Sup. Ct. R. 44(7). Under the new rule, this is done at the trial court level pursuant to the provisions of App. R. 8, rather than by the Court members who under former Sup. Ct. R. 44 considered the petition.

Subdivision (f) is new, having no counterpart in former rules. It operates reciprocally with provisions of App. R. 14(a) and App. R. 15(b), which provide that the filing of a timely petition for rehearing tolls the running of the time to give notice of appeal or to petition for discretionary review from a Court of Appeals determination. The time for petitioning for rehearing is 20 days from issuance of mandate; that for giving notice of appeal or petitioning for discretionary review is 15 days from the same date. This means that if a party is to keep alive options for both rehearing and appellate review of Court of Appeals determinations, he must within the 15 days allowed to appeal or petition for discretionary review file a petition for rehearing. He loses any opportunity for possible rehearing if within the time given for appeal or discretionary review petition he takes either of the latter actions. His option to petition for rehearing, however, will continue to exist for 5 days after expiration of the time within which he might have appealed or petitioned for discretionary review if he failed or chose not to do either during that time.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Applied in Siders v. Gibbs, 31 N.C. App. 481, 229 S.E.2d 811 (1976); Drummond v. Cordell, 73 N.C. App. 438, 326 S.E.2d 292 (1985).

Stated in Smith v. Nationwide Mut. Ins. Co., 72 N.C. App. 400, 324 S.E.2d 868 (1985).

Cited in State v. Fayetteville St. Christian School, 299 N.C. 731, 265 S.E.2d 387 (1980); Housing, Inc. v. Weaver, 305 N.C. 428, 290 S.E.2d 642 (1982).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rules 31 and 44, Rules of Practice in the Supreme Court of North Carolina.

Rule Mandatory. — The requirement that a petition for a rehearing be filed within so many days after the filing of the opinion in the case is mandatory upon all litigants alike, and will be rigidly enforced. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

This rule prescribes the procedure for the correction of errors by the Supreme Court. Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959).

Time of Filing Affidavit in Support of Petition. — Where the Supreme Court, on appeal, has allowed a motion for a new trial for newly discovered evidence after having fixed a time in which the parties may file their affidavit in support of the motion and per contra, the court will not thereafter allow a motion retaining the case on its docket for the purpose of correcting the amount of the judgment. Moore v. Tidwell, 194 N.C. 186, 138 S.E. 541 (1927).

When Time Begins to Run. — The time begins to run against a petition to rehear in the Supreme Court from the time the opinion was filed in the office of the clerk of that court. McGeorge v. Nicola, 173 N.C. 733, 92 S.E. 610 (1917).

Distinction Between Filing and Docketing. — The petition is said to be filed when it is received by the clerk, and this must be done within the requisite days after the filing of the opinion; it is docketed when the clerk enters it upon the records at the order of the justice, who grants the rehearing. Bird v. Gilliam, 123 N.C. 63, 31 S.E. 267 (1898).

Rehearing a Matter of Discretion. — Unlike an appeal, a petition to rehear is a matter in the discretion of the Supreme Court to be exercised under the rules prescribed by it. Moore v. Harkins, 179 N.C. 525, 103 S.E. 12 (1920).

Presumption in Favor of Judgment. — Rehearings of decisions of cases of the Supreme Court are granted only in exceptional cases, and, when granted, every presumption is in favor of the judgment already rendered. Weisel v. Cobb, 122 N.C. 67, 30 S.E. 312 (1898).

Rehearing by Means of Second Appeal Not Allowed. — A second appeal on matters determined by a decision on a former appeal will not be considered, the procedure being by a petition to rehear. Gainesville & Alachua County Hosp. Ass'n v. Atlantic C.L.R.R., 157 N.C. 460, 73 S.E. 242 (1911); LaRouge v. Kennedy, 161 N.C. 459, 77 S.E. 695 (1913).

Same Facts Will Not Warrant Second Appeal. — A party to an action may not have the decision of the Supreme Court again reviewed by it, upon a second appeal, upon the same state of facts, the former decision having become the law of the case. Strunks v. Southern Ry., 188 N.C. 567, 125 S.E. 182 (1924).

No Rehearing on Motion to Modify. — A rehearing will not be granted upon a summary motion to modify a final judgment of this court. Ruffin v. Harrison, 91 N.C. 398 (1884).

When Rehearing Allowed. — No case will be reviewed upon petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the court. Haywood v. Daves, 81 N.C. 8 (1879); Mullen v. Norfolk & N.C. Canal Co., 115 N.C. 15, 20 S.E. 167 (1894).

The petition to rehear having been fully and carefully considered, and it appearing that the errors assigned have already been passed upon in well considered opinions of this court, and no new fact has been called to the attention of the court, or new case or authority cited, or new position assumed, the petition is dismissed. Weston v. John L. Roper Lumber Co., 168 N.C. 98, 83 S.E. 693 (1914).

Only Points Certified as Erroneous Considered. — Upon a rehearing, the Supreme Court will not consider any point not certified as erroneous by counsel making the certificate. Kerr v. Hicks, 133 N.C. 175, 45 S.E. 529 (1903).

When Conclusion Assigned as Error. — It is unnecessary to consider a broadside assignment of error in a petition to rehear, "for that, granting the correctness of every legal proposition laid down by the court, and that its findings and inferences of fact were supported by the record, yet the conclusion reached by the court in its opinion is erroneous." Bunn v. Braswell, 142 N.C. 113, 55 S.E. 85 (1906).

When Petitioner Guilty of Laches. — A petition to rehear a case in the Supreme Court will not be granted when the alleged error is attributable solely to the petitioner's own laches or want of attention in looking after his case or he has neglected to follow the rules of procedure necessary to a proper presentment thereof, and especially when there is nothing to warrant the assurance that substantial relief would otherwise be afforded him. Battle v. Mercer, 188 N.C. 116, 123 S.E. 258 (1924).

Immaterial Assumption. — It is no ground for the rehearing of a case that the defendant was assumed to be a citizen of North Carolina, whereas, in fact, he was not, when the place of his residence is immaterial. Blackwell v. Wright, 74 N.C. 733 (1876).

When Everything Considered on First Hearing. — Where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered on the first hearing, the former judgment will not be disturbed. Weisel v. Cobb, 122 N.C. 67, 30 S.E. 312 (1898).

New Trial for Newly Discovered Evidence. — A motion for a new trial, in the Supreme Court, upon the ground of newly discovered evidence, is a matter for the full court, and will not be entertained after the case has been certified down, nor will an ungranted petition to rehear, made at the same time to the justices of the court, under the rule, put the case in the Supreme Court. Smith v. Moore, 150 N.C. 158, 63 S.E. 735 (1909).

Contents of Supporting Affidavit. — It is required for the granting of a motion for a new trial upon the ground of newly discovered evidence, that it should appear by affidavit that the desired testimony will be given upon the new trial; that it is probably true, competent, and material; that there has been no laches, but that the movant had used diligence and means to procure the evidence in due time at the trial; that the evidence is not cumulative and does not tend only to contradict, impeach, or discredit a witness who has testified, and is of such a nature as to show that probably a different result will be reached on another trial, so that right will prevail. Johnson v. Seaboard Air Line R.R., 163 N.C. 431, 79 S.E. 690, 1915B Ann. Cas. 598 (1913).

When Petitioner Erroneously Deprived of Property. — Upon a petition to rehear, the case will be corrected when it appears that the petitioner has thereby been erroneously deprived of its property. State ex rel. Lee v. Martin, 188 N.C. 119, 123 S.E. 631 (1924).

Court May Order Reargument. — It is the duty of parties to see that their causes are fully argued in the Supreme Court, and where this has not been — especially where the record is voluminous and assignments of error indefinite — the court will require it to be reargued. Lenoir v. Valley River Mining Co., 104 N.C. 490, 10 S.E. 525 (1889).

Without New Petition Being Filed. — Where a new trial is granted without passing upon certain exceptions, and, upon a rehearing of the exceptions upon which new trial was granted, is reversed, the Supreme Court may order a reargument of the exceptions not passed upon, without a petition for the same being filed. Fleming v. Southern Ry., 132 N.C. 714, 44 S.E. 551 (1903).

Omission of Questions Not Discussed in Brief. — A petition to rehear in the Supreme Court will be denied when founded upon the ground that a certain question was not mentioned in the opinion, when it had not been discussed in movant's brief and he has not appealed from the judgment. Greene v. Lyles, 187 N.C. 598, 122 S.E. 297 (1924).

When No Error Assigned. — Where no exception is taken in trial court to a ruling, and no error is assigned upon rehearing, the Supreme Court will not review the ruling. Faison v. Grandy, 128 N.C. 438, 38 S.E. 897 (1901).

Section Petition to Rehear. — Where a petition to rehear a case in the Supreme Court has been allowed, the opposing party only may petition for a second rehearing thereof. Moore v. Harkins, 179 N.C. 525, 103 S.E. 12 (1920).

A party whose application for a rehearing of the case has been denied may not successfully petition for a rehearing, though additional reasons are given in the denial of the former petition by the court in reaching the same conclusion. Moore v. Harkins, 179 N.C. 525, 103 S.E. 12 (1920).

Costs When New Trial Granted. — Where, upon a rehearing, the court grants a new trial, which was refused on the former hearing, all the costs of the appeal, including those of the rehearing, are properly taxed against the appellee. Waldo v. Wilson, 174 N.C. 767, 94 S.E. 715 (1917).

Reasons for Denying Petition Not Usually Set Out. — The reasons of denying a petition to rehear in the Supreme Court are not usually set out. Crowell v. Crowell, 181 N.C. 66, 106 S.E. 149 (1921).

When Petition Will be Dismissed. — Petitions to rehear will be dismissed where the grounds of error assigned are substantially the same as on the former hearing, and no new facts appear, no new authorities cited, and no new positions assumed. Montgomery v. Blades, 223 N.C. 331, 26 S.E.2d 567 (1943).

Rule 32

Mandates of the Courts

(a) **In General.** Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) **Time of Issuance.** Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk. (Amended February 1, 1985.)

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 38.

Commentary.

Subdivision (a) builds upon former Sup. Ct. R. 38, but with some alteration of the terminology traditionally employed to describe the formal action by which an appellate court's determination of an appeal is made operative. This action is most accurately described as being the issuance of the court's *mandate* to the court from which appeal was taken. The former rule, above cited, spoke of transmitting "certificates of the decisions" of the court or, alternatively, of ordering "an opinion certified down," and in general usage the court's action has come to be referred to as "certifying decisions" or "opinions." But the court itself has employed the more accurate and comprehensive terminology when called upon to analyze and interpret the significance of the action in a particular situation. See, e.g., the opinion in *D & W, Inc. v. City of Charlotte,* 268 N.C. 720 (1966). This rule employs the terminology here suggested as the more accurate. The mandate *includes,* but is not solely a certified copy of the court's opinion or judgment. And in some cases, it may take the form of a direct order to the trial tribunal, as in *D & W, Inc. v. City of Charlotte, supra;* or *Collins v. Simms,* 257 N.C. 1 (1962) (exact text of judgment mandated).

Subdivision (b). The time of issuance of a mandate has importance under these rules as the reference point for taking appeal of right from the Court of Appeals to the Supreme Court (App. R. 14(a)); for petitioning the Supreme Court to certify a Court of Appeals decision for discretionary review (App. R. 15(b)); and for petitioning either appellate court for rehearing (App. R. 44(a)). Accordingly it is important for counsel to be alerted to the ordinary course indicated in subdivision (b) by which issuance occurs 20 days after filing of the court's opinion with its clerk.

CASE NOTES

Quoted in West v. G.D. Reddick, Inc., 302 N.C. 201, 274 S.E.2d 221 (1981).

Rule 33

Attorneys

(a) **Appearances.** An attorney will not be recognized as appearing in any case unless he is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that he represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in oral argument.

(b) **Agreements.** Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 32, 33.

Commentary.

Subdivision (a) restates, in an attempt at clarification, the provisions of former Sup. Ct. R. 33.

Subdivision (b) restates, with only minor variation and no change of substance, the provisions of former Sup. Ct. R. 32.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Subsection (a) of this rule is not applicable in criminal cases involving court-appointed counsel. State v. Carter, 66 N.C. App. 21, 311 S.E.2d 5, cert. denied, 310 N.C. 745, 315 S.E.2d 705 (1984).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rule 32, Rules of Practice in the Supreme Court of North Carolina.

Verbal Agreements Not Considered When Denied. — The Supreme Court will not consider appellant's alleged verbal agreement between the parties when such is denied. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911); Brewer v. Mineola Mfg. Co., 161 N.C. 211, 76 S.E. 237 (1912); McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917).

When it appears in the Supreme Court that appellant has not served his case on appeal in time, no agreement for further extension thereof will be considered, unless it is in writing or appears by an entry on the record. Standard Mirror Co. v. Philadelphia Cas. Co., 157 N.C. 28, 72 S.E. 826 (1911); State v. Black, 162 N.C. 637, 78 S.E. 210 (1913).

Rule 34

Frivolous Appeals: Costs

If a court of the appellate division determines that an appeal has been taken frivolously and for purposes of delay, it may be dismissed at the cost of the appellant upon motion of the appellee or upon the court's own initiative.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 17(1).

Commentary.

This rule carries forward, in restated form but without change of substance, the provisions of former Sup. Ct. R. 17(1).

CASE NOTES

The appellate division possesses sufficient authority to dispose of interlocutory appeals which do not affect a substantial right by dismissal. It has express authority to do so under this rule on motion of the parties if the appeal is frivolous or taken solely for purposes of delay. Or it may exercise its general authority in response to motions filed under the general motions provision (Rule 37). Or the appellate division may dismiss upon its own motion as part of its general duty to apply the laws governing the right to appeal. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Motions to dismiss appeals from being interlocutory should properly be filed after the record on appeal is filed in the appellate court. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Rule 35

Costs

(a) **To Whom Allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) **Direction as to Costs in Mandate.** The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and designate the party against whom taxed.

(c) **Costs of Appeal Taxable in Trial Tribunals.** Any costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein, and may be collected by execution of the trial tribunal.

(d) **Execution to Collect Costs in Appellate Courts.** Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the State; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is amenable to the penalties prescribed by law for failure to make due and proper return.

Drafting Committee Note

Sources and parallels in former rules and statutes: Subd. (a)-(c): None. Subd. (d): Sup. Ct. R. 43(2).

Commentary.

General. Former rules did not speak directly to standards or procedures by which the appellate courts should tax costs of appeal which by law were properly assessable by these courts. By statute, G.S. § 7A-11 (Supreme Court) and 7A-20(b) (Court of Appeals) both appellate courts have the authority to fix by rule the fees to be assessed against litigants for costs incurred in those courts. This is done by separate special rule outside the scope of these Rules.

Subdivision (a) lays down the basic standard by which, following traditional practice, those costs properly assessable by the appellate court are taxed to the losing party.

Subdivision (b) repeats a provision also included in App. R. 32(a) "Mandates of the Courts."

Subdivision (c) takes into account the fact that some costs of appeal are assessable in the trial court, and can only be assessed after the final determination on appeal of the losing party who is to bear them. See G.S. § 6-33, 7A-304(b), 7A-305(5).

Subdivision (d) builds on former Sup. Ct. R.

43(2) in providing for direct execution to collect costs taxed by the appellate courts.

CASE NOTES

Applied in City of Wilmington v. Camera's Eye, Inc., 43 N.C. App. 558, 259 S.E.2d 589 (1979).

Rule 36

Trial Judges Authorized to Enter Orders Under These Rules

(a) **When Particular Judge Not Specified by Rule.** When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) Superior court: the judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special judge resident in the district or assigned to hold courts in the district wherein the cause is docketed;

(2) District court: the judge who entered the judgment, order, or other determination from which appeal was taken; the chief district judge of the district wherein the cause is docketed; and any judge designated by such chief district judge to enter interlocutory orders under G.S. § 7A-192.

(b) **Upon Death, Incapacity, or Absence of Particular Judge Authorized.** When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will upon motion of any party designate another judge to act in the matter. Such designation will be by order entered ex parte, copies of which will be mailed forthwith by the Clerk of the Supreme Court to the judge designated and to all parties.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

Subdivision (a). The only judicial action which under these Rules must be taken by a "particular" judge is that of settling the record on appeal. Per G.S. § 1-283 and App. R. 11(c), only the judge from whose judgment appeal is taken may settle the record. All other judicial actions permitted to be taken by trial judges under these rules, including dismissals for failure to perfect appeals under App. R. 25, and extensions of time to take action under App. R. 27(c), come under the provisions of this subdivision. This involves a change from former practice which permitted only the "trial judge" to extend the time within which "case on appeal" (now "proposed record on appeal") might be served.

Subdivision (b) is complementary to newly re-written G.S. § 1-283 which provides for the continued authority of the only judge authorized to settle a record on appeal despite the expiration of his term after appeal has been taken from his judgment.

Rule 37

Motions in Appellate Courts

(a) **Time; Content of Motions; Response.** An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) **Determination.** Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 36.

Commentary.

General. Motion practice in the appellate division is fairly limited. It extends to such matters as obtaining dismissals under App. R. 25; extensions of time under App. R. 27(c); peremptory settings for oral argument under App. R. 29(b); modification in the times allocated for oral argument under App. R. 30(b); additions or amendments to the record on appeal under App. R. 9(b)(6); and substitution of parties under App. R. 38. This Rule 37 builds upon and expands the rudimentary directions for motion practice found in former Sup. Ct. R. 36.

Subdivision (a) carries forward from former Sup. Ct. R. 36 the point that motions may be made down to the very time of oral argument, unless a specific time limit applies to the particular motion. This necessitates the provision in the penultimate sentence of this subdivision which accommodates to the possibility that a motion may be filed within 10 days of argument so that the normal response time of 10 days cannot be given.

Subdivision (b) contains an accommodation to the occasional emergency situation requiring ex parte relief, or possibly to a situation created by extremely late filing of motion so that it is impracticable to await response if effective relief is to be given. The protection given the adverse party in such a situation by the penultimate sentence is like that available to parties subjected ex parte to t.r.o.'s who may move to dissolve. Given the modest forms of relief which may be obtained by motion practice in the appellate division, all interests are thought adequately protected by this provision. The last sentence, providing that determination is ordinarily without oral argument, is new.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

The appellate division possesses sufficient authority to dispose of interlocutory appeals which do not affect a substantial right by dismissal. It has express authority to do so under Rule 34 on motion of the parties if the appeal is frivolous or taken solely for purposes of delay. Or it may exercise its general authority in response to motions filed under the general motions provision (this rule). Or the appellate division may dismiss upon its own motion as part of its general duty to apply the laws governing the right to appeal. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Motions to dismiss appeals as being interlocutory should properly be filed after the record on appeal is filed in the appellate court. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Applied in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Cited in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rule 36, Rules of Practice in the Supreme Court of North Carolina.

Only Motions in Writing Entertained. — The Supreme Court will not entertain any motion, unless reduced to writing. McCoy v. Lassiter, 94 N.C. 131 (1886); Hoyle v. Bagby, 253 N.C. 778, 117 S.E.2d 760 (1961).

Rule 38

Substitution of Parties

(a) **Death of a Party.** No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative, or, if he has no personal representative, by his attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) **Substitution for Other Causes.** If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) **Public Officers; Death or Separation from Office.** When a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules to be taken. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 37.

Commentary.

General. This rule deals with the situation created by the loss of legal capacity of a party by death or other occurrence at those stages of litigation after an appealable order or judgment has been entered for or against the erstwhile party. Former Sup. Ct. R. 37 dealt in limited fashion with the situation under the title "Abatement and Revivor." This treated only the death possibility. This new rule attempts to deal more clearly with the total situation.

Subdivision (a) deals only with the situation created by *death* of a party acting in an *individual* (as opposed to official) capacity. Substitution for such a party for other reasons than death is treated in subd. (b). The problem of substitution for parties acting in *official* capacities is treated in subd. (c). After stating the basic non-abatement principle in its lead sentence, subdivision (a) then deals successively with the different situations created by death of parties in two distinct time intervals. The first is treated in the first paragraph and is that interval between the taking of appeal and its final disposition. The distinction made as to the proper persons to be substituted depending upon whether the action is "real" or "personal" is dictated by such cases as *Paschal v. Autry,* 256 N.C. 166 (1962), which hold in a variety of contexts that in real actions the cause passes to successors in interest, not personal representatives, so that judgments only against the latter would not bind the former. The substitution procedure described applies whether the deceased party was appellant or appellee. The last sentence of the first paragraph accommodates to the possibility that in a personal action, where the personal representative is the proper substitute party, none has been appointed. Here the opposing party, whether appellee or appellant, may invoke court intervention to provide a proper substitute. This provision is particularly necessary for appellants whose appeals simply cannot proceed until proper substitution for their deceased adversary is made.

The second paragraph deals with another possible time interval, and one which poses quite different problems. This is the time period after appealable judgment is entered but before appeal has been taken. Here it is necessary to differentiate between the deaths of potential appellants and of potential appellees. The first sentence deals with the death in this interval of a potential appellee. Here the aggrieved party may simply proceed to take appeal within the time limited, without first obtaining substitution. Under our procedure this problem could be posed (except in the most exceptional circumstance) only where the appellant had not taken appeal by oral notice, i.e., when he must both file and serve notice of appeal upon all other parties. This rule does not speak directly to the problem of affecting service in this situation upon the now deceased adverse party. A proper solution would seem to be to serve the party's attorney of record under App. R. 26(c), or if the action is a real action wherein successors in interest are readily ascertainable, upon them as the prospective substitute parties. After appeal has been taken, substitution as described for the post-appeal interval must then be made. The other possibility, of death of the potential appellant during this interval, is handled by authorizing his attorney of record to take appeal, with substitution to follow. (The alternative of appeal by personal representative is unlikely to be available in view of the 10-day limit on taking appeal, but could of course be realized.)

Subdivision (b) simply borrows the procedures of subdivision (a) for substitution necessitated by any other cause than death of a party acting in an individual capacity.

Subdivision (c) is new, with no counterpart in former rules.

CASE NOTES

I. In General.
II. Decisions Under Prior Law.

I. IN GENERAL.

Cited in Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977); Brown v. Fulford, 311 N.C. 205, 316 S.E.2d 220 (1984).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former Rule 37, Rules of Practice in the Supreme Court of North Carolina.

Death of Party Pending Appeal. — Where a party dies pending appeal, his personal representative will be made a party by order of the court. First & Citizens Nat'l Bank v. Toxey, 210 N.C. 470, 187 S.E. 553 (1936).

When a party dies pending appeal, his administratrix will be substituted as a party upon motion. Peterson v. McLamb, 221 N.C. 538, 19 S.E.2d 488 (1942).

Rule 39

Duties of Clerks; When Offices Open

(a) **General Provisions.** The clerks of the courts of the appellate divisions shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) **Clerk's Docket Book, Judgment Docket and Minute Book.** There shall be maintained in the offices of the clerks of each of the courts of the appellate division (i) a docket book, (ii) a judgment docket, and (iii) a minute book.

(i) In the docket book the clerk shall enter all appeals, motions, petitions, and orders docketed or entered in the court.

(ii) In the judgment docket the clerk shall enter a brief memorandum of every final judgment or order of the court, show the party against whom costs are adjudicated, and identify each case by its title and its number in the docket book. The judgment docket shall be indexed and cross-indexed in alphabetical order to the name of all parties.

(iii) In the minute book the clerk shall enter a brief summary of the proceedings of the court in each appeal disposed of and a brief summary of all sittings and ceremonies of the court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 39.

Commentary.

This rule is devoted to a description of those internal administrative and clerical operations of the clerk's offices in the appellate division which it is considered should be known to counsel in their conduct of appellate practice.

Rule 40

Consolidation of Actions on Appeal

Two or more actions which involve common questions of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by App. R. 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 14.

Commentary.

This carries forward in restated form the provisions of former Sup. Ct. R. 14. That rule made no specific mention of the possibility that consolidation might be on either party or court initiative, but this was certainly implied. This new rule makes more specific the general provision in the former rule regarding the role of parties and court respectively in setting the "course of argument." The provisions of App. R. 30(b) are obviously available to parties in consolidated appeals to move for enlargement of the basic times therein allocated as totals for each "side."

Rule 41

Title

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "App. R. . . . .," is also appropriate.

APPENDIXES

Appendix A: Timetables for Appeals
Appendix B: Format and Style
Appendix C: Arrangement of Record on Appeal
Appendix D: Forms
Appendix E: Content of Briefs
Appendix F: Fees and Costs

Editor's Note. — These Appendixes were adopted Dec. 7, 1982, and amended Jan. 1, 1983. Appendixes A and F were further amended Oct. 7, 1985.

APPENDIX A

TIMETABLES FOR APPEALS

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THESE RULES

Action	*Time (Days)*	*From date of*	*Rule Reference*
Taking Appeal (civil)	10	entry of judgment (unless tolled)	3(c)
Taking Appeal (crim.)	10	entry of judgment (unless tolled)	4(a)(2)
Filing and serving proposed record on appeal	60	taking appeal	11(b)
Filing and serving objections or proposed alternative record on appeal	15	service of proposed record	11(c)
Requesting judicial settlement of record	10	last day within which an appellee served could file objections, etc.	11(c)
Judicial settlement of record	20	service on judge of request for settlement	11(c)
(Certification of Record	10	settlement of record on appeal but only if Notice of Appeal filed prior to 1 February 1985. NO CERTIFICATION IS RE-	

Action	*Time (Days)*	*From date of*	*Rule Reference*
		QUIRED FOR RECORDS ON APPEAL WHERE NOTICE IS FILED ON OR AFTER THAT DATE.)	
Filing Record on Appeal in appellate court	15	settlement of record on appeal (or 10 days from certificate of record under old rules.)	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	20	Clerk's mailing of printed record — or from docketing record in civil appeals in forma pauperis	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	20	Clerk's mailing of printed record — or from docketing record in civil appeals in forma pauperis	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	20	service of appellant's brief	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time. Practical time is 60-90 days)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THESE RULES

Action	*Time (Days)*	*From date of*	*Rule Reference*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(a)

Action	*Time (Days)*	*From date of*	*Rule Reference*
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a), 15(a)
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
Filing appellant's brief (or mailing brief under Rule 26(a))	20	Clerk's mailing of printed record — or from docketing record in civil appeals in forma pauperis	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	20	service of appellant's brief	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time. Practical time is 60-90 days)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

Note:

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27(c) also explains the significance of the 150-day time period so often misunderstood. The trial tribunal may extend any times during the preparation of the record on appeal, so long as the record may be filed in the appellate court by the 150th day after the notice of appeal was filed. Any extensions of time which would cause the record to be so filed later than the 150th day after the notice of appeal was filed may only be granted by the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c))

(Amended October 7, 1985.)

APPENDIX B

FORMAT AND STYLE

All documents for filing in either appellate court are prepared on 8½ x 11 inch, white paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format.

Papers shall be prepared using pica (10 pitch) type and spacing, so as to produce a clear, black image. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be 60 spaces wide and 57 lines long. Tabs are located at the following spaces from the left margin: 5, 10, 15, 20, 30 (center), and 40.

Captions of Documents

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the judicial district from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. ____

(Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA)
or)
(Name of Plaintiff)) From (Name) County
) No. ____________
v)
)
(Name of Defendant))

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the trial division should include directly below the name of the county and indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled to a NEW BRIEF.

Indexes

A brief or petition which is long or complex or which treats multiple issues, and all appendixes to briefs (Rule 28) and records on appeal (Rule 9) must contain an index to the contents.

The index should be indented ten spaces from *each* margin, providing a 40-space line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record) **INDEX**

Organization of the Court 1
Complaint of Tri-Cities Mfg. or Co. 1

***

* PLAINTIFF'S EVIDENCE:
  John Smith 17
  Tom Jones 23
Defendant's Motion for Nonsuit 84
* DEFENDANT'S EVIDENCE:
  John Q. Public 86
  Mary J. Public 92

***

Request for Jury Instructions 101
* Charge to the Jury 102
Jury Verdict 108
Order of Judgment 109
Appeal Entries 110
Order Extending Time 110
Assignments of Error 112
Certificate of Service 113
Stipulation of Counsel 114
Names and Addresses of Counsel 115

Use of the Transcript of Evidence with Record on Appeal

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the complete stenographic transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page #), and bound in (# of volumes) volumes is filed contemporaneously with this record. The transcript has been certified by (name), (deputy) (ass't) Clerk of the Superior Court of (name) County."

The transcript should be prepared with a clear, black image on 8½x 11 paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, file one copy in the appellate court, and provide the clerk of the superior court with a copy if required. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

Table of Cases and Authorities

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to *A Uniform System of Citation* (13th ed.).

Format of Body of Document

The body of the document should be single spaced with double spaces between paragraphs and triple spaces before topical headings.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented 10 spaces from the left margin and about five spaces from the right. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetical entry in the text. (R pp. 38-40) References to the transcript, if used, should be made in similar manner. (T p. 558)

Topical Headings

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented five spaces from the left margin.

Numbering Pages

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g. -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

Signature and Address

All original papers filed in a case will bear the original signature of at least one counsel participating in the case. The name, address, and telephone number of the person signing, together with the capacity in which he signs the paper will be included. Counsel participating in argument must have signed the brief in the case prior to that argument.

APPENDIX C

ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables which are required by Rule 9(b) in the particular case should be included in the record. See Rule 9(b)(5) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

TABLE 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(1)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(1)(ii)
4. Statement of record items showing jurisdiction, per Rule 9(b)(1)(iii)
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order

*10. Plaintiff's evidence, with any evidentiary rulings assigned as error
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings assigned as error
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error
14. Issues tendered by parties
15. Issues submitted by court
*16. Court's instructions to jury, per Rule 9(b)(1)(vi)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Appeal entries, per Rule 9(b)(1)(ix)
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal, extension of time, etc.
23. Clerk's certification of record on appeal
24. Names, office addresses, and telephone numbers of counsel for all parties to appeal

TABLE 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(2)(i)
3. Statement of organization of superior court, per Rule 9(b)(2)(ii)
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(b)(2)(iii)
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all items from administrative proceeding filed for review in superior court, including evidence

*8. Evidence taken in superior court, in order received

9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Appeal entries, per Rule 9(b)(2)(viii)
11. Assignments of error, with pertinent exceptions, per Rule 9(b)(2)(ix)
12. Entries showing settlement of record on appeal, extension of time, etc.
13. Clerk's certification of record on appeal
14. Names, office addresses, and telephone numbers of counsel for all parties to appeal

TABLE 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(3)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(3)(ii)
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of jurors

*10. State's evidence, with any evidentiary rulings assigned as error
11. Motions at close of state's evidence, with rulings thereon (* if oral)
*12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)
*14. State's rebuttal evidence, with any evidentiary rulings assigned as error
15. Motions at close of all evidence, with rulings thereon (* if oral)
*16. Court's instructions to jury, per Rules 9(b)(3)(vi), 10(b)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal, extension of time, etc.
23. Clerk's certification of record on appeal
24. Names, office addresses and telephone numbers of counsel for all parties to appeal

TABLE 4

EXCEPTIONS SET OUT IN RECORD ON APPEAL

A. Examples related to evidentiary rulings

1. Evidence admitted
   Q. Did you hear D. call a name?
   A. Yes.
   Q. Whose name did he call?
      Objection.
      Objection overruled.
      EXCEPTION No. 7.
   A. The name of E. F.
2. Evidence excluded
   Q. Did you hear D call a name?
   A. Yes.
   Q. Whose name did he call?

Objection.
Objection sustained.
(Witness would have testified: "The name of E. F.")
EXCEPTION No. 8.

B. To ruling on motion for directed verdict

At the close of all the evidence the defendant renewed his motion for directed verdict on the stated grounds that the plaintiff's evidence established as a matter of law his contributory negligence.
Motion denied.
EXCEPTION No. 9.

C. To refusal of court to submit issue tendered by defendant

Issues tendered by the defendant:

...

2. If so, did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer?

...

The court refused to submit issue No. 2.
EXCEPTION No. 10.

D. Examples related to judge's instructions to jury

1. Instruction erroneously given
   (Enclose in brackets portion of instructions to which exception is directed, followed by entry:)
   EXCEPTION No. 11.
2. Law not explained, as required by N.C.R.Civ.P. 51
   (Entry to be made at end of instructions given by court:)
   The court failed to instruct the jury on the doctrine of last clear chance.
   EXCEPTION No. 12.
3. Law not applied to evidence, as required by N.C.R.Civ.P. 51
   (Entry to be made at end of instructions given by court.)
   The court failed in instructing the jury to apply the doctrine of last clear chance to plaintiff's evidence, Record pp. 80-90.
   EXCEPTION No. 13.

TABLE 5

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant, on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).
   EXCEPTION No. 1, R p. 4.
2. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.
   EXCEPTION No. 2, R p. 7.
3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R.Civ.P. 35, on the ground that on the record before the court, good cause for the examination was shown.
   EXCEPTION No. 3, R p. 10.

4. The court's denial of defendant's motion for summary judgment, on the ground that there was not genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.
   EXCEPTION No. 4, R p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F. R p. 30, on the ground that the testimony was hearsay.
   EXCEPTION No. 7, R p. 29.
   EXCEPTION No. 8, R p. 30.
2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.
   EXCEPTION No. 8, R p. 45.
3. The court's instructions to the jury, R pp. 50-51, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.
   EXCEPTION No. 10, R p. 51.
4. The court's instructions to the jury, R pp. 53-54, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.
   EXCEPTION No. 11, R p. 54.
5. The court's denial of defendant's motion for a new trial for newly discovered evidence; on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.
   EXCEPTION No. 9, R p. 80.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence; on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.
   EXCEPTION No. 1, R p. 20.
2. The court's Finding of Fact No. 10 on the ground that there was insufficient evidence to support it.
   EXCEPTION No. 2, R p. 25.
3. The court's Conclusion of Law No. 3, on the ground that there are no findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.
   EXCEPTION No. 3, R p. 27.

APPENDIX D

FORMS

Captions for all documents filed in the Appellate Division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

1. Notices of Appeal

a. *to Court of Appeals from Trial Division*
Appropriate in all appeals of right from district or superior courts, except appeals from criminal judgments imposing sentences of death or of imprisonment for life.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff) (Defendant) (NAME OF PARTY) hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment) (from the order) entered on (date) in the (District) (Superior) Court of (name) County, (describing it).

Respectfully submitted this . . . . . . day of . . . ., 19. . . ..

s/. . . . .
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

b. *to Supreme Court from a Judgment of the Superior Court Including a Sentence of Life Imprisonment or Death*

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment, entered by (name of Judge), in the Superior Court of (name) County on (date), which judgment included a sentence of (death) (imprisonment for life).

Respectfully submitted this . . . . . . day of . . . ., 19. . . ..

s/. . . . .
Attorney for Defendant-Appellant
(Address and Telephone)

c. *to the Supreme Court from a Judgment of the Court of Appeals*
Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under G.S. 7A-30. The appealing party shall enclose a certified copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff) (Defendant) (name of party) hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describing it), which judgment ...

(*Constitutional question* — G.S. 7A-30(1)) ... directly involves substantial questions arising under the Constitution(s) (of the United States) (and) (or) (of the State of North Carolina) as follows:

> (here describe the specific issues, citing Constitutional provisions under which they arise, and showing how such issues were timely raised below and are set out in the record on appeal, e.g.:

"Question 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's assignment of error to the denial of his Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving the defendant of his constitutional right to be secure in his person, house, papers, and effects, against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp. 7 thru 10). Exception No. 11 (R p. 136). This constitutional issue was determined erroneously by the Court of Appeals."

(*dissent* — G.S. 7A-30(2)) ... was entered with a dissent by Judge (name).

(*rate-making* — G.S. 7A-30(3)) ... was entered upon review of a decision of the North Carolina Utilities Commission in a general rate-making case.
Respectfully submitted this ...... day of ...., 19.....

s/..................................
Attorney for (Plaintiff) (Defendant)-Appellant
(Address and Telephone)

2. Appeal Entries

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9(b) showing appeal duly taken by oral notice under App. Rule 3(a)(1) or 4(a)(1);
2) judicial approval of the undertaking on appeal required by App. Rules 6; and
3) the entry required by App. Rule 9(b) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

Per Tables 1, 2, and 3 of Appendix C, such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional, and serves as authentication of the substance of the entries.

(Defendant) gave due notice of appeal to the (Court of Appeals) (Supreme Court). Appeal bond in the sum of $.......... adjudged to be sufficient. (Defendant) is allowed .... days in which to serve proposed record on appeal, and (plaintiff) is allowed . . . . days thereafter within which to serve objections or a proposed alternative record on appeal.

This . . . . . . day of . . . ., 19. . . ..

s/. . . . .
Judge Presiding

3. Petition for Discretionary Review Under G.S. 7A-31.

To seek review of the opinion and judgment of the Court of Appeals where appellant contends case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that such appeal lies of right due to substantial constitutional questions under G.S. 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from G.S. 7A-31 which provide the basis for the petition). In support of this petition, (Plaintiff) (Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals.

Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal argument to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should be to show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is one significant to the jurisprudence of the State or one which offers significant public interest. If the Court is persuaded to take the case, then the appellant may deal thoroughly with the substantive issues in the new brief.)

Respectfully submitted this . . . . . . day of . . . ., 19. . . ..

s/. . . . .
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

4. Petition for Writ of Certiorari

To seek review 1) of the judgments or orders of trial tribunals in the appropriate appellate court when the right to prosecute an appeal has been lost or where no right to appeal exists; 2) by the Supreme Court of the decisions and orders of the Court of Appeals where no right to appeal or to petition for discretionary review exists or where such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT) (COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment) (order) (decree) of the (Honorable (name), Judge Presiding, (name) County Superior (District) Court) (North Carolina Court of Appeals), dated (date) (here describe the judgment, order, or decree appealed from); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of petition: e.g. failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument to justify issuance of writ: e.g., reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment) (order) (decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition.)

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the (Superior Court of (name) County) (North Carolina Court of Appeals) to permit review of the (judgment) (order) (decree) above specified, upon errors (to be) assigned in the record on appeal constituted in accordance with the Rules of Appellate Procedure; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the . . . . . . day of . . . ., 19. . . .

s/. . . . .
Attorney for Petitioner
(Address and Telephone)
(Verification by petitioner or counsel)
(Certificate of service upon opposing parties)
(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in petition.)

5. Petition for Writ of Supersedeas under Rule 23 and Motion for Temporary Stay

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g., fines, are stayed automatically pending an appeal of right).

A motion for temporary stay is appropriate to show good cause for immediate stay of execution on an ex parte basis pending the court's decision on the petition for supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS) (SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution) (enforcement) of the (judgment) (order) (decree) of the (Honorable . . . ., Judge Presiding, (Superior) (District) Court of . . . . County) (North Carolina Court of Appeals), dated . . . ., pending review by this Court of said (judgment) (order) (decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: e.g., trial judge has vacated the entry upon finding security deposited under G.S. Section . . . . inadequate; or that trial judge has refused to stay execution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument for justice of issuing writ: e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment) (order) (decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the (Superior) (District) Court of . . . . County) (North Carolina Court of Appeals) staying (execution) (enforcement) of its (judgment) (order) (decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (Appeal) (discretionary review) (review by extraordinary writ) (now pending) (the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the . . . . . . day of . . . ., 19. . . .

s/. . . . .
Attorney for Petitioner
(Address and Telephone)
(Verification by petitioner or counsel.)
(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included in the main petition as part of it or filed separately.

Motion for Temporary Stay

(Plaintiff) (Defendant) respectfully applies to the Court for an order temporarily staying (execution) (enforcement) of the (judgment) (order) (decree) which is the subject of (this) (the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this application, movant shows that (here set out legal and factual argument for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened of petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable ...., Judge Presiding, Superior Court of .... County, sentenced the defendant to death, execution being set for (date of execution)

2. That pursuant to G.S. 15A-2000 (d)(1), there was an automatic appeal of this matter to the Supreme Court of North Carolina, and that defendant's notice of appeal was given (describe the circumstances).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the scheduled date for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted, this the ...... day of ...., 19.....

s/..............................
Attorney for Defendant
(Address and Telephone)
(Certificate of Service on
Attorney General, District Attorney,
and Warden of Central Prison)

APPENDIX E

CONTENT OF BRIEFS

CAPTION

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF, or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, e.g., DEFENDANT-APPELLEE'S NEW BRIEF (where the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

INDEX OF THE BRIEF

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

INDEX

TABLE OF CASES AND AUTHORITIES ii
QUESTIONS PRESENTED 1
STATEMENT OF THE CASE 2
STATEMENT OF THE FACTS 2
ARGUMENT:
I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION ... 10

***

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE FRUITS OF A WARRANTLESS SEARCH OF HIS APARTMENT BECAUSE THE CONSENT GIVEN WAS THE PRODUCT OF POLICE COERCION 28
CONCLUSION 34
CERTIFICATE OF SERVICE 35
APPENDIX:
  VOIR DIRE DIRECT EXAMINATION OF JOHN Q. PUBLIC .... App. 1 - 7
  VOIR DIRE CROSS-EXAMINATION OF JOHN Q. PUBLIC .... App. 8 - 11
  VOIR DIRE DIRECT EXAMINATION OF OFFICER LAW N. ORDER .... App. 12 - 17
  VOIR DIRE CROSS-EXAMINATION OF OFFICER LAW N. ORDER .... App. 18 - 20

*****

TABLE OF CASES AND AUTHORITIES

This table should begin at the top margin of the page following the Index. Page reference should be made to the first citation of the authority in each question to which it pertains.

TABLE OF CASES AND AUTHORITIES

Dunaway v New York, 442 US 200, 99 SCt 2248, 60 LEd2d 824 (1979)	11
State v Perry, 298 NC 502, 259 SE2d 496 (1979)	14
State v Reynolds, 298 NC 380, 259 SE2d 843 (1979)	12
United States v Mendenhall, 446 US 544, 100 SCt 1870, 64 LEd2d 497 (1980)	14
4th Amendment, U. S. Constitution	28
14th Amendment, U. S. Constitution	28
GS 15A-221	29
GS 15A-222	28
GS 15A-223	29

*****

QUESTIONS PRESENTED

The inside caption is on "page 1" of the brief, followed by the questions presented. The phrasing of the questions presented need not be identical with that set forth in the assignments of error in the record; however, the brief may not raise additional questions or change the substance of the questions already presented in those documents. The appellee's brief need not restate the questions unless the appellee desires to present additional questions to the Court.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

***

STATEMENT OF THE CASE

If the Questions Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Questions Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, John Q. Public, was convicted of first degree rape at the October 5, 1981, Criminal Session of the Superior Court of Bath County, the Honorable I. M. Wright presiding, and received the mandatory life sentence for the Class B felony. The defendant gave notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on October 8, 1981.

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on January 22, 1982. The record was filed and docketed in the Supreme Court on April 5, 1982.

STATEMENT OF THE FACTS

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the questions presented. The facts should be stated objectively and concisely and should be limited to those which are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute of the facts, may restate the facts as they objectively appear from the appellee's viewpoint.

ARGUMENT

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, e.g.,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.
ASSIGNMENT OF ERROR NO. 2 (R p 45)
EXCEPTION NOS. 5 (R p 23), 6 (T p 366), and 7 (T pp 367-390)

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the appendix to the brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument.

CONCLUSION

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

SIGNATURE AND CERTIFICATE OF SERVICE

Following the conclusion, the brief must be dated and signed, with the attorney's mailing address and telephone number, all indented to the third tab.

The Certificate of Service is then shown with centered, upper case heading, the certificate itself, describing the manner of service upon the opposing party, with the complete mailing address of the party or attorney served blocked on the first tab, followed by the date and the signature of the person certifying the service.

APPENDIX TO THE BRIEF UNDER THE TRANSCRIPT OPTION

Appellate Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts of the transcript considered essential to the understanding of the arguments presented.

Counsel is encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be gathered into an appendix to the brief which is situated at the end of the brief, following all signatures and certificates. Counsel should *not* compile the entire transcript into an appendix to support issues involving a directed verdict, sufficiency of evidence, or the like.

The appendix should be prepared so as to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The appendix should include a table of contents, showing the issue from the brief, followed by the pertinent contents of the appendix, the transcript or appendix page reference and a reference back to the page of the brief citing the appendix. For example:

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The appendix will be printed with the brief to which it is appended; however, it will not be retyped, but run as is. Therefore, clarity of image is extremely important.

APPENDIX F

FEES AND COSTS

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas — docketing fee of $10.00 for each document, i.e.: docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to clerk, Court of Appeals) where review of judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $250.00 is required in civil cases per Appellate Rule 6. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $4.00 per printed page where the document is retyped and printed; $1.50 per printed page where the clerk determines that the document is in proper format and can be printed from the original. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28 (b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00 and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case. (Amended January 1, 1983; October 7, 1985.)

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Adopted January 1, 1973.

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Rule 1

Authority

These rules are promulgated pursuant to the authority contained in G.S. 7A-377, and are effective January 1, 1973.

Rule 2

Organization; Officers; Meetings; Quorum

The Commission shall have a Chairman, who is the Court of Appeals member, and a Vice-Chairman, who shall be elected by the members. The Vice-Chairman shall preside in the absence of the Chairman. The Commission shall also have a Secretary, who shall be elected by the members and perform such duties as the Commission may assign. The Vice-Chairman and Secretary shall serve for one-year terms, and may succeed themselves.

The Commission shall meet on the call of the Chairman or of any four members.

A quorum for the conduct of business shall consist of any four members, except as otherwise provided in these rules.

Each member of the Commission, including the Chairman, Vice-Chairman, Secretary, or other presiding member, shall be a voting member.

The Commission shall ordinarily meet in Raleigh, but may meet anywhere in the State. The Commission's address is P. O. Box 1122, Raleigh, N. C. 27602.

Rule 3

Interested Party

A judge who is a member of the Commission is disqualified from acting in any case in which he is a respondent, except in his own defense.

Rule 4

Confidentiality of Proceedings

(a) All papers filed with and proceedings before the Commission are confidential, unless the respondent judge otherwise requests. The recommendations of the Commission to the Supreme Court, and the record filed in support of the recommendations are not confidential.

(b) At the request of the judge involved:

1) when a judge is publicly charged with involvement in proceedings before the Commission and the result of such publicity is substantial unfairness to him, the Commission may issue a short statement of clarification and correction; or

2) when a judge is publicly associated with having engaged in serious reprehensible conduct or having committed a major offense, and after a preliminary investigation or a formal hearing it is determined that there is no basis for further proceedings or recommendations, the Commission may issue a short explanatory statement.

(c) Upon resolution of the Commission:
when a formal hearing has been ordered in a proceeding and the Commission determines that the subject matter is generally known to the public and in which there is broad public interest, and the Commission further determines that confidence in the administration of justice is threatened due to lack of information concerning the status of the proceeding and the requirements of due process, the Commission may, after permitting the judge involved the right of consultation with the Commission, issue one or more short announcements confirming the hearing, clarifying the procedural aspects, and defending the right of the judge to a fair hearing.

(d) All written communications to a judge (counsel, guardian, guardian ad litem) pursuant to these rules shall be enclosed in a securely sealed inner envelope marked "Confidential."

Rule 5

Defamatory Matter

Testimony and other evidence presented to the Commission is privileged in any action for defamation. No other publication of such evidence shall be privileged, except that the record filed by the Commission in the Supreme Court continues to be privileged.

Rule 6

Unfounded or Frivolous Complaints

(a) Upon receipt of a written complaint that is obviously unfounded or frivolous, the Commission shall write a short letter of explanation to the complainant. The judge involved shall not be notified of these complaints unless otherwise determined.

(b) A determination that a complaint is unfounded or frivolous may be made by two Commission members one of whom must be a judge or attorney. Such determination may be reconsidered by the full Commission at its next meeting.

Rule 7

Preliminary Investigation

(a) The Commission, upon receiving a written complaint, not obviously unfounded or frivolous, alleging facts indicating that a judge may be guilty of willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or alleging that a judge is suffering from a mental or physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent, shall make a preliminary investigation to determine whether formal proceedings should be instituted. The Commission may also make a preliminary investigation on its own motion.

(b) The judge shall be notified of the investigation, the nature of the charge, and whether the investigation is on the Commission's own motion or upon written complaint, and afforded a reasonable opportunity to present such relevant matters as he may choose. Such notice shall be in writing, and may be transmitted by a member of the Commission, any person of suitable age and discretion designated by it, or by certified or registered mail.

If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the judge shall be so notified, and the case closed.

Rule 8

Notice of Formal Proceedings

After the preliminary investigation has been completed, if the Commission concludes that formal proceedings should be instituted, it shall promptly so notify the judge. Such notice shall be entitled "BEFORE THE JUDICIAL STANDARDS COMMISSIONS, Inquiry Concerning a Judge, No. . . . . . ." The notice shall identify the complainant, and shall specify in ordinary and concise language the charge or charges against the judge. The judge shall be advised of alleged facts upon which such charges are based, and a copy of the verified complaint shall be furnished to the judge, and the notice shall advise the judge of his right to file a written, verified answer to the charges against him within 20 days after service of the notice upon him. A notice shall be served upon the judge by personal service by a member of the Commission, or some person of suitable age and discretion designated by it. If, after reasonable efforts to do so, personal service cannot be effected, service by certified or registered mail is authorized. Notice by mail shall be addressed to the judge at his residence of record.

Rule 9

Answer

(a) Within 20 days after service of the complaint and notice of formal proceedings the judge may file with the Commission an original and 8 copies of an answer, which shall be verified.

(b) The notice, complaint and answer constitute the pleadings. No further pleadings may be filed, and no motions may be filed against any of the pleadings.

Rule 10

Formal Hearings

Upon the filing of an answer, or upon the expiration of the time allowed for its filing, the Commission shall order a formal hearing before it concerning the charges. The hearing shall be held no sooner than 10 days after filing of the answer, or after the deadline for filing of the answer, unless the judge consents to an earlier hearing. The notice shall be served in the same manner as the notice of charges under Rule 8.

At the date set for the formal hearing, the Commission shall proceed whether or not the judge has filed an answer, and whether or not he appears in person or through counsel, but failure of the judge to answer or to appear shall not be taken as evidence of the facts alleged in the charges.

Special counsel (who shall be an attorney) employed by the Commission, or counsel supplied by the Attorney General at the request of the Commission, shall present the evidence in support of the charges. Counsel shall be sworn to preserve the confidential nature of the proceeding.

The hearing shall be recorded by a reporter employed by the Commission for this purpose. The reporter shall also be sworn to preserve the confidential nature of the proceeding. (Amended December 12, 1975.)

Rule 11

Witnesses; Oaths; Subpoenas; Compensation

Witnesses shall take an oath or affirmation to tell the truth and not to divulge the name of the judge or the existence of the proceeding until the matter is no longer confidential under these rules. The oath to witnesses may be administered by any member of the Commission.

Subpoenas to witnesses shall be issued in the name of the State, and shall be signed by a member of the Commission. They shall be served, without fee, by any officer authorized to serve process of the General Court of Justice.

Witnesses are entitled to the same compensation and reimbursement for travel expenses as witnesses in a civil case in the General Court of Justice. Vouchers authorizing disbursements for Commission witnesses shall be signed by the Chairman or Secretary of the Commission.

Rule 12

Medical Examination

When the mental or physical health of a judge is in issue, the Commission may request the judge to submit to an examination by a licensed physician or physicians of its choosing. If the judge fails to submit to the examination, the Commission may take his failure into account, unless it has good reason to believe that the judge's failure was due to circumstances beyond his control. The judge shall be furnished a copy of the report of any examination conducted under this rule.

The examining physician or physicians shall receive the fee of an expert witness, to be set by the Commission.

Rule 13

Rights of Respondent

In formal hearings involving his censure, removal, or retirement, a judge shall have the right and opportunity to defend against the charges by introduction of evidence, representation by counsel, and examination and cross-examination of witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or to produce books, papers, and other evidentiary matter.

A copy of the transcript of proceedings prepared for transmission to the Supreme Court shall be furnished to the judge and, if he has objections to it, he may within 10 days present his objections to the Commission, and the Chairman or Vice-Chairman or his designee shall consider his objections and settle the record prior to transmitting it to the Supreme Court.

The judge has the right to have all or any portion of the testimony in the hearings transcribed at his own expense.

Once the judge has informed the Commission that he has counsel, a copy of any notices, pleadings, or other written communications (other than the transcript) sent to the judge shall be furnished to counsel by any reliable means. (Amended December 12, 1975; January 27, 1978.)

Rule 14

Evidence

At a formal hearing before the Commission, legal evidence only shall be received, and oral evidence shall be taken only on oath or affirmation.

Rulings on evidentiary matters shall be made by the Chairman, or the Vice-Chairman presiding in his absence. (Amended December 12, 1975.)

Rule 15

Amendments to Notice or Answer

The Commission, at any time prior to its recommendation, may allow or require amendments to the notice of formal proceedings, and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearings. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

Rule 16

Commission Voting

The affirmative vote of at least five members of the Commission is necessary to recommend to the Supreme Court censure or removal of a judge. A vote of four (a quorum) is necessary for any other official action, except as specified in Rule 6 for disposing of unfounded or frivolous complaints.

Rule 17

Contempt

The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission.

Rule 18

Record of Proceedings

The Commission shall keep a record of all preliminary investigations and formal proceedings concerning a judge. In formal hearings testimony shall be recorded verbatim, and if a recommendation to the Supreme Court for censure or removal is made, a transcript of the evidence and all proceedings therein shall be prepared, and the Commission shall make written findings of fact and conclusions of law in support of its recommendation. (Amended December 12, 1975.)

Rule 19

Transmission of Recommendations to Supreme Court

After reaching a recommendation to censure or remove a judge, when 10 days have expired after the transcript of the proceeding has been transmitted to the judge and no objection has been filed, or when the record is settled after objection has been made, the Commission shall promptly file with the Clerk of the Supreme Court the transcript of proceedings, and its findings of fact, conclusions of law, and recommendation, certified by the Chairman or Secretary. The Commission shall concurrently transmit to the judge a copy of the transcript (if the judge objected to the original transcript, and settlement proceedings resulting in changes in the transcript were had), its findings, conclusions, and recommendation. (Amended January 27, 1978.)

Rule 20

Proceedings in the Supreme Court

Proceedings in the Supreme Court shall be as prescribed by Supreme Court Rule. See G.S. 7A-33.

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RULES FOR SUPREME COURT REVIEW OF RECOMMENDATIONS OF THE JUDICIAL STANDARDS COMMISSION

Adopted September 25, 1975.

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Rule 1

Definitions

In these rules, unless the context or subject matter otherwise requires:

(a) Commission means the Judicial Standards Commission.

(b) Judge or respondent means a justice or judge of the General Court of Justice who has been recommended for censure or removal under N. C. Gen. Stat. ch. 7A, art. 30 (1974 Supp.).

(c) Court means the Supreme Court of North Carolina. Clerk means the Clerk of the Supreme Court.

(d) Commission's attorney means the attorney who represented the Commission at the hearing which resulted in the recommendation under consideration by the Court.

(e) The masculine gender includes the feminine gender.

(f) Service of a document required to be served means either mailing the document by U.S. certified mail, return receipt requested, to the person to be served or service in the manner provided in Rule 4 of the N.C. Rules of Civil Procedure.

Rule 2

Petition for Hearing

(a) **Notice to Judge.** When the Commission, pursuant to its Rule 19, files with the Clerk a recommendation that a judge be censured or removed, the Clerk shall immediately transmit a copy of the recommendation by U.S. certified mail, return receipt requested, to the respondent named therein.

(b) **Petition for Hearing.** The respondent may petition the Court for a hearing upon the Commission's recommendation. The petition shall be signed by the judge or his counsel of record and specify the grounds upon which it is based. It must be filed with the Clerk within 10 days from the date shown on the return receipt as the time the respondent received the copy of the recommendation from the Clerk. At the time the petition is filed it shall be accompanied by a certificate showing service of a copy of the petition upon the Commission's attorney and its chairman or secretary. Upon the filing of his petition, the respondent becomes entitled under G.S. 7A-377 to file a brief and, upon filing a brief, to argue his case to the Court, in person and through counsel.

(c) **Failure to File Petition.** If a respondent fails to file a petition for hearing within the time prescribed, the Court will proceed to consider and act upon the recommendation on the record filed by the Commission. Failure to file a petition waives the right to file a brief and to be heard on oral argument.

(d) **Briefs.** Within 15 days after filing his petition, the respondent may file his brief with the Clerk. At the time the brief is filed the respondent shall also file a certificate showing service of a copy of the brief upon the Commission's attorney and its chairman or secretary. Within 15 days after the service of such brief upon him, the Commission's attorney may file a reply brief, together with a certificate of service upon the respondent and his attorney of record. The form and content of briefs shall be similar to briefs in appeals to the Court.

(e) **Oral Argument.** After the briefs are filed, and as soon as may be, the Court will set the case for argument on a day certain and notify the parties. Oral arguments shall conform as nearly as possible to the rules applicable to arguments on appeals to the Court. A judge who has filed a brief may, if he desires, waive the oral argument. A judge who has filed a petition but who has not filed a brief will not be heard upon oral argument.

Rule 3

Decision by the Court

After considering the record, and the briefs and oral arguments if any, the Court will act upon the Commission's recommendation as required by G.S. 7A-377. The decision on a recommendation for removal shall be by a written opinion filed and published as any other opinion of the Court. Decision on a recommendation for censure shall be by a written order filed with the Clerk and published in the Advance Sheets and bound volumes of the Supreme Court Reports. (Amended April 14, 1976.)

Rule 4

Reproduction of Record and Briefs

As soon as the Commission files with the Clerk a recommendation of censure or removal and the transcript of the proceedings on which it is based, the Clerk will reproduce and distribute copies of the record as directed by the Court. When briefs are filed, one copy will suffice. The Clerk will also reproduce and distribute copies of the briefs as directed by the Court.

Rule 5

Costs

If the Court dismisses the Commission's recommendation the costs of the proceeding will be paid by the State; otherwise, by the judge. Reproduction and other costs in this Court will be taxed as in appeals to the Court, except there will be no filing fee.

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CODE OF JUDICIAL CONDUCT

Adopted September 26, 1973.

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2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities
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CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Legal Periodicals. — For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

CASE NOTES

Code Is Guide to Meaning of § 7A-376. — The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of § 7A-376. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

A judge willfully abuses the power and prestige of his office by consenting to receive and receiving sums of money not in payment of a legal salary, fee, or perquisite of his office as a district court judge with the corrupt intent and understanding that said sums are to influence his action in the performance of or the omission to perform his duties as an officer of the court and a public official in violation of the laws of the State and his oath of office. In re Hunt, 308 N.C. 328, 302 S.E.2d 235 (1983).

Judge's efforts to prevent the convening of a grand jury for his own benefit would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Contact with Solicitor on Behalf of Another Who Faced Rape Charges Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Applied in In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CASE NOTES

Conduct in Conferring Alone with Defendant Concerning Pending Cases Held Violation of This Canon. — See In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

A judge willfully abuses the power and prestige of his office by consenting to receive and receiving sums of money not in payment of a legal salary, fee, or perquisite of his office as a district court judge with the corrupt intent and understanding that said sums are to influence his action in the performance of or the omission to perform his duties as an officer of the court and a public official in violation of the laws of the State and his oath of office. In re Hunt, 308 N.C. 328, 302 S.E.2d 235 (1983).

Judge's efforts to prevent the convening of a grand jury for his own benefit would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Cited in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) The use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) The broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) The photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) The means of recording will not distract participants or impair the dignity of the proceedings;

(ii) The parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) The reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) The reproduction will be exhibited only for instructional purposes in educational institutions.

B. Administrative Responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that hold securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Subdivision A(7) Suspended until Dec. 31, 1984. — The order adopted Sept. 21, 1982, and effective Oct. 18, 1982, provides that subdivision A(7) of this Canon and Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, published in 276 N.C. at 740, are hereby suspended to and including Dec. 31, 1984, and electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed on an experimental basis, in accordance with the terms of the order. For the aforementioned order concerning electronic media and still photography coverage of public judicial proceedings, see the contents of this volume.

Legal Periodicals. — For a survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

CASE NOTES

Conduct need not be criminal in order to constitute willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Conduct in Conferring Alone with Defendant Concerning Pending Cases Held Violation of This Canon. See In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

Judge's efforts to prevent the convening of a grand jury for his own benefit would support a charge of common-law obstruction of justice. It also violates Canons 1, 2(A), and 3(A)(4). In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

A judge willfully abuses the power and prestige of his office by consenting to receive and receiving sums of money not in payment of a legal salary, fee, or perquisite of his office as a district court judge with the corrupt intent and understanding that said sums are to influence his action in the performance of or the omission to perform his duties as an officer of the court and a public official in violation of the laws of the State and his oath of office. In re Hunt, 308 N.C. 328, 302 S.E.2d 235 (1983).

The failure of a judge to make due inquiry into the facts and law upon which his judgments were based and his execution of them upon a mere ex parte application of counsel for defendants violates this Canon. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Conduct Violative of Subdivision A(4). — A judge violated subdivision A(4) of this canon where, in disposing of a traffic case, (a) the plea of guilty was not taken in open court in the presence of the defendant, the assistant district attorney and the prosecuting officer; (b) the plea of guilty was taken without prior notice to the assistant district attorney; (c) the judgments signed by the judge were signed out of the presence of the defendant, assistant district attorney and prosecuting officer; (d) the judgments were signed by the judge when court was not in session and in places where court is not held; and (e) the judgments were signed without prior notice to the assistant district attorney. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976).

A criminal prosecution is an adversary proceeding in which the prosecuting attorney and defendant or his counsel are entitled to be present and to be heard. Failure to accord the prosecutor such opportunity violates this Canon. In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977); In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Failure to Disqualify Himself on Motion to Recuse. — The trial judge committed error by not disqualifying himself from considering a motion to recuse himself from hearing the plaintiffs' motion to set aside a judgment on grounds of excusable neglect, since a reasonable man knowing all the circumstances would have had doubts about the judge's ability to rule on the motion to recuse in an impartial manner. McClendon v. Clinard, 38 N.C. App. 353, 247 S.E.2d 783 (1978).

Use of a judge's office to grant leniency or favors to a defendant because of sexual activities between a judge and a defendant is willful misconduct in office. In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Contact with Solicitor on Behalf of Another Who Faced Rape Charges Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Contact with Assistant District Attorney on Behalf of Another Who Faced Driving under the Influence Charge Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

Changing of Parole Conditions without Notice to Solicitor Held Willful Misconduct. — See In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

A court has not only the inherent power but also the duty to discipline attorneys for unprofessional conduct. Unprofessional conduct subject to this power and duty includes misconduct, malpractice, or deficiency in character, and any dereliction of duty except mere negligence or mismanagement. In re Hunoval, 294 N.C. 740, 247 S.E.2d 230 (1977).

Applied in In re Greene, 306 N.C. 376, 297 S.E.2d 379 (1982); State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

Cited in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

CANON 4

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper

performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) A judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) A judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

E. Arbitration. A judge should not act as an arbitrator or mediator.

F. Practice of Law. A judge should not practice law.

G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public Reports. A judge shall report the name and nature of any source or activity from which he received more than $1,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, shall file such report with the Clerk of the Superior Court of the county in which he resides. For each calendar year, such report shall be filed not later than May 15th of the following year. (Amended December 30, 1974; November 3, 1983.)

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.
  (1) A judge or candidate for election to judicial office should not:
    (a) Act as a leader or hold any office in a political organization. For example, he may not attend a political convention on any level as a delegate; nor may he preside or serve as an officer at any precinct meeting, convention, or other political convocation. He

may attend a precinct meeting, convention or other political convocation provided he does not violate any other Canon, particularly 7A(1)(b) or (c).

(b) Make speeches for a political organization or candidate or publicly endorse a candidate for public office; provided, a judge or candidate for judicial office may endorse, as between contestants for a judicial office, the candidate he considers best qualified and may contribute to a campaign fund in behalf of such candidate, but may not solicit funds in behalf of such candidate.

(c) Solicit funds for a political organization or candidate.

(d) Make financial contributions to any candidate for political office, except as expressly provided in subsection (b) hereinabove, unless the candidate is a member of the judge's or judicial candidate's family.

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or reelection, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) The foregoing provisions of Canon 7A do not prohibit a judge's spouse or any other adult member of his family from engaging in political activity provided the spouse or other family member acts in accordance with his or her individual convictions, on his or her own initiative, and not as alter ego of the judge himself.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) Should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) Should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) Should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2). (Amended December 30, 1974; March 16, 1976.)

CASE NOTES

Political Organizations. — The political organizations envisioned by section A(2) of Canon 7 are entities such as the Republican Party, the Wake County Democratic Men's Club, the Democratic Party, the Conservative Party, etc. In re Wright, — N.C. —, 329 S.E.2d 668 (1985).

A campaign committee set up by a candidate to handle the contributions to his campaign is not a "political organization" as referred to by section A(2) of Canon 7, but is, in effect, the alter ego of the candidate. In re Wright, — N.C. —, 329 S.E.2d 668 (1985).

Under section (A)(1) of Canon 7, checks made to a candidate's campaign committee must be treated as contributions to the candidate. In re Wright, — N.C. —, 329 S.E.2d 668 (1985).

Contributions to Political Campaigns. — The clear purpose of section A(1) of Canon 7 is to prevent judges from making contributions to the campaigns of candidates for political office other than judicial candidates or members of the judge's family. In re Wright, — N.C. —, 329 S.E.2d 668 (1985).

Contributions of a district court judge to the United States Senate campaign of former Governor and to the gubernatorial campaign of former Attorney General, by checks payable to the campaign committees of the candidates, violated Canon 7 and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute, meriting censure. In re Wright, — N.C. —, 329 S.E.2d 668 (1985).

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

(a) Continue to act as an officer, director, or non-legal advisor of a family business;

(b) Continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.

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Editor's Note. — The rules of the North Carolina State Bar were originally adopted on October 18, 1933, but were revised and readopted on September 1, 1942.

ARTICLE I.

Functions.

§ 1. Purpose.

The North Carolina State Bar shall foster the following purposes, namely:

To cultivate and advance the science of jurisprudence;

To promote reform in the law and in judicial procedure;

To facilitate the administration of justice;

To uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession;

To encourage higher and better education for membership in the profession;

To promote a spirit of cordiality and brotherhood among the members of the Bar; and

To perform all duties imposed by law.

§ 2. Division of Work.

To facilitate the work for the accomplishment of the above enumerated purposes, the Council may, from time to time, classify such work under appropriate sections and committees, either standing or special, of the North Carolina State Bar.

The Council shall determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to each committee.

Any committee may, at the discretion of the appointing or electing authority, be composed of Council members or members of the North Carolina State Bar who are not members of the Council or of lay persons or of any combination. (Amended February 25, 1980.)

§ 3. Cooperation with Local Bar Association Committees.

The sections and committees so appointed may secure the cooperation of like sections and committees of The North Carolina Bar Association and all local Bar Associations of the State.

§ 4. Organization of Local Bar Associations.

The Council shall encourage and foster the organization of local Bar Associations.

§ 5. Annual Program.

The Council shall provide a suitable program for each annual meeting of The North Carolina State Bar.

§ 6. Reports Made to Annual Meeting.

The reports of the several sections and committees, with their recommendations, shall be delivered to the Secretary of The North Carolina State Bar at least thirty days before the annual meeting. Such reports, together with any reports from special committees that the Council desires to present to the annual meeting, may be printed and sent to each member of The North Carolina State Bar at least twenty days before such meeting. Nothing herein shall preclude any section, committee or the Council from presenting a report of recommendation that has not been so printed and mailed.

ARTICLE II.

Membership — Annual Membership Fees.

§ 1. Register of Members.

The Secretary-Treasurer shall keep a register for the enrollment of members of The North Carolina State Bar. In appropriate places therein entries shall be made showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the Council may from time to time require.

Every member shall register by signing a registration card, which in substance shall require, until the future order of the Council, the member to furnish the following information:

1. Name and address.
2. Date.
3. Date passed examination to practice in North Carolina.
4. Date and place sworn in as an attorney.
5. Date and place of birth. If not born in the United States, when and where naturalized.
6. Whether admitted to the United States District Court, United States Circuit Court of Appeals, or United States Supreme Court.
7. Membership, if any, in bar associations, giving name of each.
8. Whether suspended or disbarred, and if so, when and where, and when readmitted.

§ 2. Annual Membership Fees; When Due.

The annual membership fee shall be in the amount fixed by statute and said membership fee shall be due and payable to the Secretary-Treasurer on the first day of January in each year and the same shall become delinquent if not paid on or before July 1 of each year.

No part of said membership fee shall be apportioned to fractional parts of the year, and no part of the membership fees shall be rebated by reason of death, resignation, suspension or disbarment.

Written notice of failure to pay annual membership fees shall be sent to a member at his last known business address by the Secretary of the State Bar.

From and after April 18, 1969 any attorney who has been suspended for the nonpayment of dues be reinstated only upon the payment of all past dues, plus interest and costs, plus $25.00 reinstatement fee. (Amended March 1, 1956; July 11, 1969).

§ 2.1. Interstate Practice of Law.

No law firm or professional corporation having among its constituent partners or employees attorneys who are not licensed to practice law in North Carolina or having as its partner a law firm or professional corporation which has among its constituent partners, shareholders or employee attorneys who are not licensed to practice law in North Carolina may do business in North Carolina without first having obtained a certificate of registration. The Secretary of the North Carolina State Bar shall issue such a certificate upon satisfaction of the following conditions precedent:

(1) There shall be filed with the Secretary of the North Carolina State Bar a registration statement disclosing:

(a) All names used to identify the filing law firm or professional corporation;

(b) Addresses of all offices maintained by the filing law firm or professional corporation;

(c) The name and address of any law firm or professional corporation with which the filing law firm or professional corporation is in partnership and the name and address of such partnership;

(d) The name and address of each attorney who is a partner, shareholder or employee of the filing law firm or professional corporation or who is a partner, shareholder or employee of a law firm or professional corporation with which the filing law firm or professional corporation is in partnership;

(e) The relationship of each attorney identified in (d) above to the filing law firm or professional corporation;

(f) The states to which each attorney identified in (d) above is admitted to practice law.

(2) There shall be filed with the registration statement certificates showing that each attorney identified in (1)(d) above who is not licensed to practice law in North Carolina is a member in good standing of each state bar to which he had been admitted. Such certificates must bear the seal of the state agency or court of last resort which is responsible for regulating the legal profession in the issuing state.

(3) There shall be filed with the registration statement a notarized statement of the filing law firm or professional corporation affirming that each attorney identified in (1)(d) above who is not licensed to practice law in North Carolina will govern his personal and professional conduct with respect to legal matters arising from North Carolina in accordance with the Code of Professional Responsibility of the North Carolina State Bar.

(4) There shall be submitted with each registration statement and supporting documentation a registration fee of $90.00 as administrative cost.

A certificate of registration shall remain effective until January 1 following the date of filing and may be renewed annually by the Secretary of the North Carolina State Bar upon the filing of an updated registration statement which satisfies the requirements set forth above and the submission of the registration fee.

This rule shall not be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

§ 3. Petition of Member Claiming to Be Inactive.

All members who claim to be inactive shall file a duly verified petition with the Secretary addressed to the Council setting forth fully:

1. Date of admission to the Bar and place of residence from which admitted.
2. The practice, times and places.
3. Present occupation or work engaged in and residence, and duties performed during the period the applicant claims to be or have been inactive.
4. Grounds upon which applicant desires classification.
5. That applicant is at the time of filing petition a member in good standing having paid all fees required and without any charges undisposed of against him.
6. Any further matters pertinent to the petition. (Amended March 1, 1956.)

§ 4. Order Placing Petitioner on Inactive List.

The Council may in its discretion order the petitioner to be placed on the inactive list of membership on the records of the Secretary and may in its discretion revoke such order at any time.

It is the policy of the Council from and after April 18, 1969 that:

Members of The North Carolina State Bar serving in the armed services whether in a legal or a nonlegal capacity will be exempt from payment of dues so long as they are on active duty in the military service.

Each inquiry be treated on an individual basis and that those attorneys who are found to be engaged in a very limited capacity and who are 75 years of age and over that they be granted inactive status upon proper petition.

Any attorney assuming a judicial position of any kind and nature which precludes him from the practice of law shall become inactive during the period he holds said position and exempt from the payment of dues.

§ 5. Application for Reinstatement.

Any person who has been a member of The North Carolina State Bar, but who has been placed on the inactive list, and who desires to be reinstated or to resume the practice of law within this State may be reinstated as an active member upon the following conditions:

(1) That he make application for active membership on a form to be prescribed by the Council and supply under oath all information therein requested.

(2) That he satisfy the Council that he intends to resume the practice of law in North Carolina and that he has the moral qualifications, competency and learning in the law required for admission to practice law in the State of North Carolina, and that his resumption of the practice of law within this State will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive to the public interest.

(3) That with application for reinstatement received by the state bar office, after July 1, 1979, the applicant shall submit a fee of $125.00 plus any cost to the state bar for investigating and processing said application. The fee and cost shall be retained by The North Carolina State Bar.

(4) That if the application is granted, the attorney promptly pay dues for the current year in which the application is filed. (Amended November 22, 1965.)

Article III.

Election and Succession of Officers.

§ 1. Officers.

a. The Officers of the North Carolina State Bar and the Council shall consist of a President, a President-Elect, a Vice-President, and an Immediate Past President. These officers shall be deemed members of the Council in all respects.

b. There shall be a Secretary-Treasurer who shall also have the title of Executive Director. The Secretary-Treasurer shall not be a member of the Council. (Amended February 25, 1980.)

§ 2. Eligibility for Office.

The President, President-Elect, and Vice-President need not be members of the Council at the time of their election.

§ 3. Term of Office.

The term of each office shall be one year beginning at the conclusion of the annual meeting. Each officer will hold office until a successor is elected and qualified.

The President shall assume the office of Immediate Past President at the conclusion of the term as President. The President-Elect shall assume the office of President at the conclusion of the annual meeting following the term as President-Elect. (Amended October 1, 1968.)

§ 4. Elections.

a. A President-Elect, Vice-President and Secretary-Treasurer shall be elected annually by the Council at an election to take place at the Council meeting held during the annual meeting of the North Carolina State Bar. All elections will be conducted by secret ballot.

b. If there are more than two candidates for an office, then any candidate receiving a majority of the votes shall be elected. If no candidate receives a majority, then a run-off shall be held between the two candidates receiving the highest number of votes.

§ 5. Nominating Committee.

a. There shall be a Committee appointed to nominate one or more candidates for each of the offices which will meet prior to the Council meeting at which the election will be held. The Nominating Committee shall be composed of the immediate past president and the five most recent living past presidents who are in good standing with the North Carolina State Bar. The Nominating Committee shall submit its nominations by report to the Secretary 45 days prior to the election and the Secretary shall transmit the report by mail to the Council at least 30 days prior to the election.

b. The floor shall be open for additional nominations for each office at the time of the election. (Amended July 26, 1985.)

§ 6. Vacancies and Succession.

a. If the office of President becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, the President-Elect shall become President for the unexpired term and the next term. If the office of the President-Elect becomes vacant because the President-Elect must assume the presidency under the foregoing provision of this section, then the Vice-President shall become the President-Elect for the unexpired term and at the end of the unexpired term to which the Vice-President ascended the office will become vacant and an election held in accordance with section 4 a. of this Article; if the office of President-Elect becomes vacant for any other reason, the Vice-President shall become the President-Elect for the unexpired term following which said officer shall assume the presidency as if elected President-Elect. If the office of Vice-President or Secretary-Treasurer becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, or if the office of President or President-Elect becomes vacant without an available successor under these provisions then the office will be filled by election by the Council at a special meeting of the Council with such notice as required by Article VI, § 2 or at the next regularly scheduled meeting of the Council.

b. If the President is absent or unable to preside at any meeting of the North Carolina State Bar or the Council, the President-Elect shall preside, or if the President-Elect is unavailable, then the Vice-President shall preside. If none are available, then the Council shall elect a member to preside during the meeting.

c. If the President is absent from the State or for any reason is temporarily unable to perform the duties of office, the President-Elect shall assume those duties until the President returns or becomes able to resume the duties. If the President-Elect is unable to perform the duties, then the Council may select one of its members to assume the duties for the period of inability.

§ 7. Removal from Office.

The Council may, upon giving due notice and an opportunity to be heard, remove from office any officer found by the Council to have engaged in misconduct or to have a disability, including misconduct not related to the office but so infamous as to render the offender unfit for the office, misconduct amounting to noncriminal misconduct in office and misconduct which is both criminal and misconduct in office.

Article IV.

Duties of Officers.

§ 1. Compensation of Officers.

The Secretary-Treasurer shall receive a salary fixed by the Council. All other officers shall serve without compensation except the per diem allowances fixed by statute for members of the Council.

§ 2. President.

The President shall preside over meetings of the North Carolina State Bar and the Council. The President shall sign all resolutions and orders of the Council in the capacity of President. The President shall execute, along with the Secretary-Treasurer, all contracts ordered by the Council. The President will perform all other duties prescribed for the office by the Council.

§ 3. President-Elect, Vice-President, and Immediate Past President.

The President-Elect, Vice-President, and Immediate Past President will perform all duties prescribed for the office by the Council.

§ 4. Secretary-Treasurer.

The Secretary-Treasurer shall attend all meetings of the Council and of the North Carolina State Bar, and shall record the proceedings of all such meetings. He shall, with the President, President-Elect or Vice-President, execute all contracts ordered by the Council. He shall have custody of the seal of the North Carolina State Bar, and shall affix it to all documents executed on behalf of the Council or certified as emanating from the Council. He shall take charge of all funds paid into the North Carolina State Bar and deposit them in some bank selected by the Council; he shall cause books of accounts to be kept, which shall be the property of the North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of the North Carolina State Bar during usual business hours. At each January meeting of the Council, the Secretary-Treasurer shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of the North Carolina State Bar. The books of accounts shall be audited as of December 31st of each year and the Secretary shall publish same in the annual reports as referred to above. He shall perform such other duties as may be imposed upon him, and shall give bond for the faithful performance of his duties in an amount to be fixed by the Council with surety to be approved by the Council.

ARTICLE V.

Meetings of The North Carolina State Bar.

§ 1. Annual Meetings.

The annual meeting of The North Carolina State Bar, beginning with the year 1969, shall be held at such time and place within the State of North Carolina, after such notice (but not less than 30 days) as the Council may determine. (Amended October 1, 1968.)

§ 2. Special Meetings.

Special meetings of The North Carolina State Bar may be called upon thirty days' notice, as follows:

(a) By the Secretary, upon direction of the Council.

(b) By the Secretary, upon the call addressed to the Council, of not less than twenty-five percent of the active members of The North Carolina State Bar.

At special meetings no subjects shall be dealt with other than those specified in the notice.

§ 3. Notice of Meetings.

Notice of all meetings shall be given by publication in such newspapers of general circulation as the Council may select, or, in the discretion of the Council, by mailing notice to the Secretary of the several district bars or to the individual active members of The North Carolina State Bar.

§ 4. Quorum.

At all annual and special meetings of The North Carolina State Bar those active members of The North Carolina State Bar present shall constitute a quorum, and there shall be no voting by proxy. (Amended March 1, 1956; October 1, 1968; September 5, 1969.)

§ 5. Parliamentary Rules.

Proceedings at any meeting of The North Carolina State Bar shall be governed by "Roberts' Rules of Order."

ARTICLE VI.

Meetings of the Council.

§ 1. Regular Meetings.

Regular meetings of the Council shall be held on the first Friday after the second Monday in each of the months of January, April and July, at such time and place after such notice (but not less than 30 days) as the Council may determine; and on the day before the Annual Meeting of The State Bar, at the location of said Annual Meeting. The hour of meeting shall in each case be at 10 o'clock A.M. Any regular meeting may be adjourned from time to time as a majority of members present may determine. (Amended October 1, 1968.)

§ 2. Special Meetings.

The President in his discretion may call special meetings of the Council. Upon written request of eight Councillors, filed with the Secretary-Treasurer requesting the President to call a special meeting of the Council, the Secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than 10 days from the date of such call.

§ 3. Notice of Called Special Meetings.

Notice of called special meetings shall be signed by the Secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented for consideration at such special meeting. Such notice must be given to each Councillor unless waived by him. A written waiver signed by any Councillor shall be equivalent to notice as herein provided. Notice to Councillors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the

United States mail in the usual course, addressed to each of said Councillors at his law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall be deposited in the United States post office at least five days, before the day fixed for the special meeting.

§ 4. Quorum at Meeting of Council.

At meetings of the Council the presence of 10 Councillors shall constitute a quorum.

§ 5. Standing Committees of the Council.

Within 20 days after his election, the President of the Council shall select the standing committees to serve for one year beginning January 1 of the year succeeding his election which said committees shall consist of:

a. An Executive Committee of not less than five Councillors to be selected by the President.

It shall be the duty of the Executive Committee to perform such duties as the Council shall designate, including, however, the auditing of the books and records of the Secretary-Treasurer at each regular meeting of the Council. (Amended March 1, 1956; October 1, 1968.)

b. Committee on Legal Ethics and Professional Conduct of not less than three Councillors selected by the President.

It shall be the duty of the Committee on Legal Ethics and Professional Conduct to study canons of ethics and professional conduct and make such recommendations from time to time to the Council as it may deem proper and necessary; study and determine such questions as may arise as to the meaning and application of the canons of ethics and rules of professional conduct, and advise members of the State Bar upon request in respect thereto, and perform such other duties in connection with the cannons of ethics and rules of professional conduct as it may be requested to perform by the Council of The North Carolina State Bar. (Amended March 1, 1956; October 1, 1968; November 8, 1979.)

Editor's Note. — As to procedures for ruling on questions of legal ethics, see Appendix A to these rules.

c. Committee on Grievances.

Grievance Committee of not less than 15 members, one of whom shall be designated as Chairman. At least one Vice-Chairman shall be designated. The Committee shall have as members at least three councillors from each of the judicial divisions of the State. The Grievance Committee shall have the powers and duties set forth in Article IX of these rules, and shall report on the status of grievances, investigations and complaints at regular or special meetings of the Council as the Executive Committee may direct. (Amended March 1, 1956; January 20, 1961; October 1, 1968; November 4, 1975; February 3, 1976; January 30, 1985.)

Editor's Note. — As to procedures for the Committee on Grievances, see Appendix B to these rules.

d. Committee on Legislation and Law Reform of not less than three Councillors selected by the President.

It shall be the duty of the Committee on Legislation and Law Reform to examine proposed changes in the law; to examine and propose changes in the law and judicial procedure; to promote the simplification of law and procedure; and perform such other duties in connection with the improvement of law and procedure as may from time to time be requested by the Council of The North Carolina State Bar.

The Committee on Legislation and Law Reform shall not appear before committees of the Legislature, except upon the approval of the Council, nor shall it make specific endorsements of changes in the laws or of new laws except with the consent of the Council. (Amended March 1, 1956; October 1, 1968.)

e. Committee on Unauthorized Practice of not less than three Councillors selected by the President. (Amended October 1, 1968; January 24, 1978.)

Editor's Note. — As to procedures for the Committee on Unauthorized Practice, see Appendix C to these rules.

f. Committee on Membership of not less than three Councillors selected by the President. (Amended October 1, 1968.)

g. The Committee on Legal Aid to Indigents and Referrals consisting of not less than five Councillors and officers of the Council. (Amended November 14, 1966.)

Editor's Note. — As to procedures for the Committee on Legal Aid to Indigents and Referrals, see Appendix D to these rules. As to rules governing practical training of law students, see Appendix E to these rules.

h. Committee on Professional Corporations of not less than five nor more than seven Councillors to be selected by the President. (Amended January 30, 1970.)

Editor's Note. — As to regulations for professional corporations practicing law, see Appendix F to these rules.

i. Positive Action Committee of not less than seven members, one of whom shall be designated as Chairman and one as Vice-Chairman, for the purpose of implementing a program of intervention for lawyers with a substance abuse problem which affects their professional conduct; provided, no member of the Grievance Committee shall be a member of the Positive Action Committee. Such Committee's creation shall in nowise be construed so as to hinder, limit or otherwise affect the disciplinary process, but such Committee, under such rules and procedures as the Council shall promulgate, shall function and exist as follows:

(1) Have jurisdiction to investigate and evaluate allegations of substance abuse by lawyers, which specifically includes, but is not limited to, conferring with any lawyer who is the subject of such allegations as to such allegations, and making recommendations to such lawyer, should it be determined that he

or she in fact has a substance abuse problem, of sources of help for such problem;

(2) Perform similar functions as to cases referred to it by a disciplinary body, reporting the results thereof to the referring body.

(3) Except as noted herein and otherwise required by law, results of investigations, conferences and the like shall be privileged and held in the strictest confidence between the lawyer involved and the Committee. For good cause shown where the allegation of substance abuse is made by the lawyer's family, the Committee may, in its discretion, release such information to such person or persons as in its judgment will be in the best interest of the lawyer involved;

(4) Should such investigation and evaluation clearly indicate that the lawyer involved is engaging in conduct detrimental to the public, the courts, or the legal profession, the Committee shall take action, including, if warranted, filing of a grievance, as may appear appropriate to the Committee.

(5) The Committee may, under appropriate rules and regulations promulgated by the Council, establish district committees, which may exercise any or all of the functions set forth herein to the extent provided in any such rules and regulations. (Amended August 23, 1979.)

j. There is created a standing committee for the disposition of funds received by the North Carolina State Bar from interest on trust accounts. This Committee shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts.

Editor's Note. — As to the plan for disposition of funds received from interest on trust accounts, see Appendix G to these rules.

Cross References. — For ethical consideration as to deposit of client funds in interest-bearing trust accounts, see EC 9-6 of the Code of Professional Responsibility. For disciplinary rule as to deposit of client funds in interest-bearing trust accounts, see DR 9-102 of the Code of Professional Responsibility.

k. A board of legal specialization to be composed of nine members appointed by the Council of the North Carolina State Bar. The plan of specialization shall be a voluntary endeavor and not mandatory and not be funded by membership fees of the North Carolina State Bar.

Editor's Note. — As to the plan of certified legal specialization, see Appendix H to these rules.

l. Client Security Fund Board of Trustees.

(1) Pursuant to an Order of the North Carolina Supreme Court (hereinafter called the "Court") there is hereby established under the supervision of the Council of the North Carolina State Bar, a Board of Trustees to be known as Client Security Fund Board of Trustees (hereinafter called the "Board"). The function of the Board shall be to receive, manage and disburse such funds as may, from time to time, be appropriated to it as required by the Court, or voluntarily contributed to or otherwise received by it, as hereinafter provided. The purpose of the Board shall be to pay all or any part of said funds, as it deems appropriate, in reimbursement of losses caused by embezzlement, wrongful taking or conversion, of monies or other property, hereinafter called "dishonest conduct", by members of the North Carolina State Bar who practice in North Carolina.

(2) The Board shall consist of five members appointed by the President (subject to the approval by the Council), for terms as follows: one for one year, one for two years, one for three years, one for four years and one for five years.

After the initial appointments, each subsequent appointment shall be for a term of five years. No appointee who has served a full term of five years shall be eligible for re-appointment to the Board until one year after the termination of his or her last term. Vacancies shall be filled by appointments by the President of the North Carolina State Bar for the unexpired term.

(3) The Board shall be authorized, beginning January 1, 1985, to consider applications for reimbursement of losses which arise thereafter and which are caused by the dishonest conduct of any member of the North Carolina State Bar, who was acting either as an attorney or in a fiduciary capacity customary to the private practice of law in the matter in which such losses arose, but only to the extent to which these losses are not bonded or otherwise covered or protected, and provided that the claimant has exhausted all civil remedies against the attorney or his or her estate and as provided by the rules of the Board.

The Board shall investigate such applications as come to its attention. The Board shall be authorized and empowered to reject or allow such applications in whole or in part to the extent that funds are available to it. The Board shall have complete discretion to determine the order and manner of payment of approved applications. All such payments shall be a matter of grace and not of right and no person shall have any right in the Client Security Fund as a third party beneficiary or otherwise. No attorney shall be compensated by the Board for prosecuting an application before the Board.

(4) The Council of the North Carolina State Bar is authorized, subject to approval of the Court, to promulgate regulations and rules of procedure for the Board for the management of its funds and affairs, for the presentation of applications and their processing, for the payment of claims that are allowed, and for the subrogation or assignment of the rights of any reimbursed applicant.

(5) All sums received by the Board of Trustees shall be held by the Treasurer of the North Carolina State Bar in a separate account known as Client Security Fund, subject to the written direction of the Board under Board rules.

(6) The Board may use or employ the Client Security Fund for any of the following purposes within the scope of the Board's objectives as heretofore outlined:

(a) To make reimbursements on approved applications as herein provided.

(b) To purchase insurance to cover such losses in whole or in part as is deemed appropriate.

(c) To invest such portions of the fund as may not be needed currently to reimburse losses, in such investments as are permitted to fiduciaries by The General Statutes of North Carolina.

(d) To pay the administrative expenses of the Board, including employment of counsel to prosecute subrogation claims.

(7) All applications and proceedings prior to final order of the Board shall be treated by the Board as confidential unless the applicant and attorney whose alleged conduct predicates the application request that the matter be made public.

(8) The Board shall provide a full report of its activities at least annually to the Court and to the Council of the North Carolina State Bar, and shall make such other reports of its activities and give such publicity to its activities as the Court or Council may direct.

(9) This Client Security Fund may be modified or abolished by the Court. In the event of abolition, all assets of the Client Security Fund shall be disbursed by orders of the Court.

(10) The Board with the authorization of the Council shall, in the name of the North Carolina State Bar, enforce any claims which the Board may have for restitution, subrogation, or otherwise, and may employ and compensate

consultants, agents, legal counsel and other such employees as it deems necessary and appropriate. (Amended October 10, 1984.)

Editor's Note. — As to the rules of procedure for the Client Security Fund of the North Carolina State Bar, see Appendix I to these rules.

m. Committee to Study the Competence of New Admittees.

The purpose is to give assistance to new admittees to improve their practical skills and enhance their ability to serve the public competently. (Added December 4, 1984).

ARTICLE VII.

Office of The North Carolina State Bar.

§ 1. Office.

Until otherwise ordered by the Council, the office of The North Carolina State Bar shall be maintained in the city of Raleigh at such place as may be designated by the Council.

ARTICLE VIII.

Board of Law Examiners.

§ 1. Election.

At the first meeting of the Council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933.

The Council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected and such members shall serve for a term of three years, or until their successors are elected and qualified.

Beginning with the year 1935 and every third year thereafter the Council shall elect 3 members for a term of three years or until their successors are elected and qualified.

No member of the Council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the Council.

§ 2. Examination of Applicants for License.

All applicants for admission to the Bar shall first obtain a certificate or license from the Board of Law Examiners in accordance with the rules and regulations of that Board.

§ 3. Admission to Practice.

Upon receiving license to practice law from the Board of Law Examiners, the applicant shall be admitted to the practice thereof by taking the oath in the manner and form now provided by law.

§ 4. Approval of Rules and Regulations of Board of Law Examiners.

The Council shall, as soon as possible, after the presentation to it of rules and regulations for admission to the Bar, approve or disapprove such rules and regulations. The rules and regulations approved shall immediately be certified to the Supreme Court. Such rules and regulations as may not be approved by the Council shall be the subject of further study and action, and for the purpose of study, the Council and Board of Law Examiners may sit in joint session. No action, however, shall be taken by the joint meeting, but each shall act separately, and no rule or regulation shall be certified to the Supreme Court until approved by the Council.

Article IX.

Discipline and Disbarment of Attorneys.

Determination of Disability.

§ 1. General Provisions.

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, when done at other times or that it has not been made the subject of disciplinary proceedings earlier, shall not be an excuse for any member of the Bar. (Amended January 20, 1961; February 3, 1976.)

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); North Carolina State Bar v. Talman, 62 N.C. App. 355, 303 S.E.2d 175.

§ 2. Proceeding for Discipline.

The procedure to discipline members of the Bar of this State shall be in accordance with the provisions hereinafter set forth.

District Bars shall not conduct separate proceedings to discipline members of the Bar but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of the members of The North Carolina State Bar. (Amended February 2, 1960; January 20, 1961; May 2, 1962.)

§ 3. Definitions.

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

(1) **Accused or Accused Attorney:** a member of The North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(2) **Appellate Division:** The Appellate Division of the General Court of Justice.

(3) **Certificate of Conviction:** the certified copy of any judgment wherein a member of The North Carolina State Bar is convicted of a criminal offense, forwarded to the Secretary-Treasurer by the clerk of any state or federal court.

(4) **Chairman of the Grievance Committee:** councilor appointed to serve as chairman of the Grievance Committee of The North Carolina State Bar.

(5) **Commission:** The Disciplinary Hearing Commission of The North Carolina State Bar.

(6) **Commission Chairman:** the Chairman of the Hearing Commission of The North Carolina State Bar.

(7) **Complainant or Complaining Witness:** any person who has complained of the conduct of any member of The North Carolina State Bar to any officer or agency of The North Carolina State Bar.

(8) **Complaint:** a formal pleading filed in the name of The North Carolina State Bar with the Commission Chairman against a member of The North Carolina State Bar after a finding of probable cause.

(9) **Council:** the Council of The North Carolina State Bar.

(10) **Councilor:** a member of The Council of The North Carolina State Bar.

(11) **Counsel:** the Counsel of The North Carolina State Bar appointed by the Council.

(12) **Court or Courts of This State:** a court authorized and established by the Constitution or laws of the State of North Carolina.

(13) **Defendant:** a member of The North Carolina State Bar against whom a complaint is filed after a finding of probable cause.

(14) **Disabled or Disability:** condition of mental or physical incapacity interfering with the professional judgment or competence of an attorney; habitual intemperance; or the wilful and persistent failure to perform professional duties.

(15) **Grievance:** alleged misconduct.

(16) **Grievance Committee:** the Grievance Committee of The North Carolina State Bar.

(17) **Hearing Committee:** a hearing committee designated under § 14(4).

(18) **Incapacity or Incapacitated:** condition determined in a judicial pro-

ceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(19) **Investigation:** the gathering of information with respect to alleged misconduct or disability or to reinstatement.

(20) **Investigator:** any person designated to assist in investigation of alleged misconduct or of reinstatement.

(21) **Letter of Caution:** communication from the Grievance Committee to an attorney stating that past conduct of the attorney, while not the basis for discipline, is not professionally acceptable or may be the basis for discipline if continued or repeated.

(22) **Letter of Notice:** a communication to an accused attorney setting forth the substance of a grievance.

(23) **Office of the Counsel:** the office and staff maintained by the Counsel of The North Carolina State Bar.

(24) **Office of the Secretary:** the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(25) **Party:** after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused attorney as defendant.

(26) **Plaintiff:** after a complaint has been filed, The North Carolina State Bar.

(27) **Preliminary Hearing:** hearing by the Grievance Committee to determine whether probable cause exists.

(28) **Probable Cause:** a finding by the Grievance Committee that there is reasonable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(29) **Secretary:** the Secretary-Treasurer of The North Carolina State Bar.

(30) **Serious Crime:** the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of, any felony, or any crime that involves bribery, embezzlement, false pretenses and cheats, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury or wilful failure to file a tax return.

(31) **Supreme Court:** the Supreme Court of North Carolina.

(32) **Consolidation of Cases:** a hearing by a Hearing Committee of multiple charges, whether related or unrelated in substance, brought against one defendant. (Amended February 2, 1960; January 20, 1961; May 11, 1977.)

§ 4. State Bar Council — Powers and Duties in Discipline and Disability Matters.

The Council of The North Carolina State Bar shall have the power and duty:

(1) To supervise and conduct discipline and incapacity or disability proceedings in accordance with the provisions hereinafter set forth.

(2) To appoint members of the Disciplinary Hearing Commission as provided by statute.

(3) To appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

(4) To order the transfer of a member to inactive status when such member has been judicially declared incompetent or has been committed to institutional care voluntarily or involuntarily because of incompetence or disability.

(5) To accept or reject the surrender of the license to practice law of any member of The North Carolina State Bar.

(6) To order the disbarment of any member whose resignation is accepted or to refer the matter of discipline to the Disciplinary Hearing Commission for hearing and determination.

(7) To review the report of any Hearing Committee upon a petition for reinstatement of a disbarred attorney or member transferred to inactive status because of a disability and make final determination as to whether the license shall be restored. (Amended August 28, 1984.)

CASE NOTES

Cited in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

§ 5. Chairman of the Grievance Committee — Powers and Duties.

(A) The Chairman of the Grievance Committee shall have the power and duty:

(1) To supervise the activities of the Counsel.

(2) To recommend to the Grievance Committee that an investigation be initiated.

(3) To recommend to the Grievance Committee that a grievance be dismissed.

(4) To direct a Letter of Notice to an accused attorney.

(5) To issue, at the direction and in the name of the Grievance Committee, a Letter of Caution, a Private Reprimand, or a Public Censure to an accused attorney.

(6) To notify an accused attorney that a grievance has been dismissed, and to notify the complainant in accordance with § 21.

(7) To call meetings of the Grievance Committee for the purpose of holding preliminary hearings.

(8) To issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(9) To administer oaths or affirmations to witnesses.

(10) To file and verify complaints and petitions in the name of The North Carolina State Bar.

(11) To determine whether proceedings should be instituted to activate a suspension which has been stayed.

(B) The President, Vice-Chairman or senior Council member of the Grievance Committee shall perform the functions of the Chairman of the Grievance Committee in any matter when the Chairman is absent or disqualified. (Amended January 24, 1978; March 6, 1984; August 28, 1984.)

§ 6. Grievance Committee — Powers and Duties.

The Grievance Committee shall have the power and duty:

(1) To direct the Council to investigate any alleged misconduct or disability of a member of The North Carolina State Bar coming to its attention.

(2) To hold preliminary hearings, find probable cause and direct that complaints be filed.

(3) To dismiss grievances upon a finding of no probable cause.

(4) To issue a Letter of Caution to an accused attorney in cases wherein misconduct is not established but the activities of the accused attorney are deemed to be improper or may become the basis for discipline if continued or repeated.

(5) To issue a private reprimand to an accused attorney in cases wherein minor misconduct is established.

(6) To issue a public censure of an accused attorney in cases wherein a complaint and hearing are not warranted but the conduct warrants more than a private reprimand.

(7) To direct that petitions be filed seeking a determination whether a member of The North Carolina State Bar is disabled from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants. (Amended March 6, 1984.)

§ 7. Counsel — Powers and Duties.

The Counsel shall have the power and duty:

(1) To investigate all matters involving alleged misconduct whether initiated by the filing of grievance or otherwise.

(2) To recommend to the Chairman of the Grievance Committee that a matter be dismissed because the grievance is frivolous or falls outside the Council's jurisdiction; that a Letter of Caution or private reprimand be issued; or that the matter be passed upon the Grievance Committee to determine whether probable cause exists.

(3) To prosecute all disciplinary proceedings before the Grievance Committee, Hearing Committees and the courts.

(4) To represent The North Carolina State Bar in any trial, hearing or other proceeding concerned with the alleged disability of a member due to mental infirmity, illness, or addiction to drugs or intoxicants.

(5) To appear on behalf of The North Carolina State Bar at hearings conducted by Grievance Committee, Hearing Committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding.

(6) To appear at hearings conducted with respect to petitions for reinstatement or restoration of license by suspended or disbarred attorneys, to cross-examine witnesses testifying in support of the petition and to present evidence, if any, in opposition to the petition.

(7) To employ assistant counsel, investigators and other administrative personnel in such numbers as the Council may from time to time authorize.

(8) To maintain permanent records of all matters processed and the disposition of such matters.

(9) To perform such other duties as the Council may from time to time direct.

CASE NOTES

Cited in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

§ 8. Chairman of the Hearing Commission — Powers and Duties.

(A) The Chairman of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the power and duty:

(1) To receive complaints alleging misconduct and petitions alleging the disability of a member filed by the Grievance Committee; petitions requesting reinstatement or restoration of license by members of The North Carolina State Bar who have been involuntarily transferred to inactive status, suspended, or disbarred; motions seeking the activation of suspensions which have been stayed; and affidavits of resignation from members who have surrendered their licenses.

(2) To assign three members of the Commission, consisting of two members of The North Carolina State Bar and one layman, to hear such complaints, petitions, motions, or hold hearings on tender of surrender of license. The chairman shall designate one of the attorney members as chairman of the Hearing Committee. Provided: that no member shall be appointed to serve on any committee reviewing a petition for reinstatement in a case wherein that member served on the Hearing Committee that originally ordered the discipline or transfer to inactive status. The Chairman of the Hearing Commission may designate himself to serve as one of the attorney members of any Hearing Committee and shall be chairman of any Hearing Committee on which he serves.

(3) To set the time and place for the hearing on each complaint or petition.

(4) To subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) To file findings, conclusions and orders of the Hearing Committees with the Secretary.

(6) In his discretion to consolidate for hearing two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint.

(7) To prepare and issue letters of private reprimand.

(B) The Vice-Chairman of the Disciplinary Hearing Commission shall perform the function of the Chairman in any matter when the Chairman is absent or disqualified. (Amended May 11, 1977; January 24, 1978; August 28, 1984.)

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 9. Hearing Committee — Powers and Duties.

Hearing Committees of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the following powers and duties:

(1) To hold hearings on complaints alleging misconduct, petitions seeking a determination of disability or reinstatement, motions seeking the activation of suspensions which have been stayed, and affidavits of resignation.

(2) To enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the Committee shall designate.

(3) To subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Subpoenas shall be issued by the chairman of the Hearing Committee in the name of the Disciplinary Hearing Commission of The North Carolina State Bar. The chairman may direct the Secretary to issue such subpoenas.

(4) To administer oaths or affirmations to witnesses at hearings.

(5) To make findings of fact and conclusions of law.

(6) To enter orders dismissing complaints in matters before the Committee.

(7) To enter orders of discipline against attorneys in matters before the Committee.

(8) To tax costs of the disciplinary procedures against any defendant against whom discipline is imposed: Provided, however, that such costs shall not include the compensation of any member of the Council, committees or agencies of The North Carolina State Bar.

(9) To enter orders transferring a member to inactive status on the ground of incapacity or disability to continue the practice of law.

(10) To report to the Council its findings of facts and recommendations after hearings on petitions for reinstatement of disbarred attorneys or members transferred to inactive status because of a disability.

(11) To enter orders reinstating suspended attorneys or denying reinstatement. Orders denying reinstatement may include additional sanctions in the event violations of petitioner's order of suspension are found.

(12) To enter orders of discipline against attorneys who have surrendered their licenses.

(13) To enter orders activating suspensions which have been stayed or continuing the stays of such suspensions. (Amended August 28, 1984.)

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 10. Secretary — Powers and Duties in Discipline and Disability Matters.

The Secretary shall have the following powers and duties in regard to discipline and disability procedures:

(1) To receive complaints for transmittal to the Counsel.

(2) To issue summons and subpoenas when so directed by the President, the Chairman of the Grievance Committee, the Chairman of the Disciplinary Hearing Commission, or the Chairman of any Hearing Committee.

(3) To maintain a record and file of all grievances not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Grievance Committee.

(4) To perform all necessary ministerial acts normally performed by the Clerk of the Superior Court in complaints filed before the Disciplinary Hearing Commission.

(5) To enter orders of reinstatement where petitions for reinstatement of suspended attorneys are unopposed by the Counsel. (Amended November 13, 1980; August 28, 1984.)

§ 11. Grievances — Form and Filing.

(1) A grievance may be filed by any person against a member of The North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the Counsel. The Counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose. Such standard forms shall be available in the Office of the Counsel, the Office of the Secretary, and the offices of the several clerks of court in this State. Grievances reduced to writing on such standard form shall be transmitted by the complainant to the Office of the Secretary.

(2) Upon the direction of the Council or the Grievance Committee the Counsel shall undertake the investigation of such conduct of any member of The North Carolina State Bar as may be specified by the Council or Grievance Committee.

(3) The Counsel may undertake an investigation of any matter coming to the attention of the Counsel involving alleged misconduct of a member of The North Carolina State Bar: Provided that such investigation has been authorized by the Chairman of the Grievance Committee.

§ 12. Investigation; Initial Determination.

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Grievance Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the grievance as may be appropriate and submit to the Chairman of the Grievance Committee a report detailing the findings of the investigation.

(2) Within fifteen days of the receipt of the initial or any interim report of the Counsel concerning any grievance, the Chairman of the Grievance Committee may: (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused attorney in writing or otherwise; or (3) send a Letter of Notice to the accused attorney.

(3) If a Letter of Notice is sent to the accused attorney, it shall be by registered or certified mail and shall direct that a response be made within fifteen days of receipt of the Letter of Notice. Such response shall be in a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct.

(4) If a timely response to a Letter of Notice is made, the Chairman of the Grievance Committee shall direct the Counsel to conduct further investigation or shall terminate the investigation and so inform the Counsel.

(5) For reasonable cause, the Chairman of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the accused,

for examination concerning the grievance and may compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena shall be issued by the Chairman of the Grievance Committee, or by the Secretary at the direction of the Chairman. The Counsel, Assistance Counsel, Investigator, or any members of the Grievance Committee designated by the Chairman may examine any such witness under oath or otherwise.

(6) Within forty-five days of the receipt of the final report of the Counsel, or the termination of an investigation, the Chairman shall convene the Grievance Committee for a preliminary hearing or seek approval of the Committee of the dismissal of the grievance.

(7) Neither the unwillingness nor neglect of the complainant to sign a grievance, nor settlement, compromise or restitution shall, in itself, justify abatement of an investigation into the conduct of an attorney. (Amended January 30, 1985.)

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 13. Preliminary Hearing.

(1) The Grievance Committee shall determine whether there is probable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(2) The Chairman of the Grievance Committee shall have the power to administer oaths and affirmations.

(3) The Chairman shall keep a record of the number of members concurring in the finding of every grievance and shall file the record with the Secretary, but the record shall not be made public except on order of the Council.

(4) The Chairman shall have the power to subpoena witnesses and compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) The Counsel, and assistant counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the Committee is in session, and deliberating, but no persons other than members may be present while the Committee is voting.

(6) Disclosure of matters occurring before the Committee other than its deliberations and the vote of any member may be made to the Counsel or the Secretary for use in the performance of their duties. Otherwise a member, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the Committee only when so directed by a court of record preliminarily to or in connection with a judicial proceeding.

(7) At any preliminary hearing held by the Grievance Committee, a quorum of one-half of the members shall be required to conduct any business. Affirmative vote of a majority of members present shall be necessary for a finding that probable cause exists. The Chairman shall not be counted for quorum purposes and shall be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(8) If probable cause is found, the Chairman shall direct the Counsel to prepare and file a complaint against the accused attorney. If no probable cause is found the grievance shall be dismissed.

(9) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the accused attorney is not in accord with accepted professional practice, or may be the subject of discipline if continued or repeated, the Committee may issue a Letter of Caution to the accused attorney. A record of such Letter of Caution shall be maintained in the Office of the Secretary.

(10) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the Committee may issue a private reprimand to the accused attorney. A record of such private reprimand shall be maintained in the Office of the Secretary, and a copy of the private reprimand shall be served upon the accused attorney as provided in G.S. 1A-1, Rule 4. Within fifteen days after service the accused attorney may refuse the private reprimand and request that charges be filed. Such refusal and request shall be addressed to the Grievance Committee and filed with the Secretary. The Counsel shall thereafter prepare and file a complaint against the accused attorney.

(11) If probable cause is found and it is determined by the Grievance Committee that a complaint and hearing are not warranted but the conduct warrants more than a Private Reprimand, the Committee may issue a notice of proposed public censure to the accused attorney. A copy of the proposed public censure shall be served upon the accused attorney as provided in G.S. § 1A-1, Rule 4. The accused attorney must be advised that he may accept the public censure within fifteen days after service upon him or a formal complaint will be filed before the Disciplinary Hearing Commission. The accused attorney's acceptance must be in writing, addressed to the Grievance Committee and filed with the Secretary. Once the public censure is accepted by the accused, the discipline becomes public and must be filed as provided by § 23(A)(2).

(12) Formal complaints shall be issued in the name of The North Carolina State Bar as plaintiff, signed or verified by the Chairman of the Grievance Committee. (Amended May 11, 1977; January 24, 1978; August 28, 1984; January 30, 1985.)

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 14. Formal Hearing.

(1) Complaints shall be filed in the Office of the Secretary. The Secretary shall cause a summons and a copy of the complaint to be served upon the defendant attorney and thereafter a copy of the complaint shall be delivered to the Chairman of the Disciplinary Hearing Commission, informing the Chairman of the date service on the defendant was effected.

(2) Service of complaints and other documents or papers shall be accomplished as set forth in G.S. 1A-1, Rule 4.

(3) Complaints in disciplinary actions shall set forth the charges with sufficient precision to clearly apprise the defendant attorney of the conduct which is the subject of the complaint.

(4) Within seven days of the receipt of return of service of a complaint in the office of the Secretary, the Chairman of the Disciplinary Hearing Commission shall designate a Hearing Committee from among the members of the Commission. The Chairman shall notify the Counsel and the defendant of the composition of the Hearing Committee. Such notice shall also contain the time and place determined by the Chairman for the hearing to commence. The commencement of the hearing shall be initially scheduled not less than 60 nor more than 90 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint.

When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the Chairman of the Disciplinary Hearing Commission may consolidate the cases for hearing, and the hearing shall be initially scheduled not less than 60 nor more than 90 days from the date of service of the last complaint upon the defendant attorney.

(5) Within twenty days after the service of the complaint, unless further time is allowed by the Chairman upon good cause shown, the defendant shall file an answer to the complaint with the Secretary and shall deliver a copy to the Counsel.

(6) Failure to file an answer admitting, denying or explaining the complaint, or asserting the grounds for failing to do so, within the time limited or extended, shall be grounds for entry of the defendant's default and in such case the allegations contained in the complaint shall be deemed admitted. The Secretary shall enter the defendant's default when the fact of default is made to appear by motion of counsel for the plaintiff or otherwise. The plaintiff may thereupon apply to the Hearing Committee for a default order imposing discipline, and the Hearing Committee shall thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The Hearing Committee may, in its discretion, hear such further or additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the Hearing Committee may set aside the Secretary's entry of default. After an order imposing discipline has been entered by the Hearing Committee upon the defendant's default, the Hearing Committee may set aside the order in accordance with Rule 60(b) of the Rules of Civil Procedure.

(7) Discovery shall be available to the parties in accordance with the North Carolina Rules of Civil Procedure, G.S. 1A-1, Rules 26-37. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended, for good cause shown, by the Chairman. The Chairman may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(8) In order to provide opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, for settlement of a proceeding, or any of the issues therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences between the parties for such purposes may be held at any time prior to or during hearings as time, the nature of the proceeding, and the public interest may permit. Any settlement or compromise of any issue in the case shall be subject to the approval of the Hearing Committee.

(9) At the discretion of the Chairman of the Hearing Committee a conference may be ordered prior to the date set for commencement of the hearing, and upon five days' notice to the parties, for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such

conference may be held before any member of the Committee designated by its Chairman. At any prehearing or other conferences which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the possibility of the following:

(a) The simplification of the issues.

(b) The exchange and acceptance of service of exhibits proposed to be offered in evidence.

(c) The obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.

(d) The limitation of the number of witnesses.

(e) The discovery of production of data.

(f) Such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

(9.1) The Chairman of the Hearing Committee may hear and dispose of all pretrial motions excepting only motions the granting of which would result in continuance or dismissal of the charges or final judgment for either party.

(10) The initial hearing date as set by the Chairman in accordance with subsection (4) of this section may be reset by the Chairman pursuant to subsections (5) and (7) of this section, and said initial hearing or reset hearing may be continued by the Hearing Committee for a period not to exceed thirty days, for good cause shown.

(11) Unless necessary to afford the accused due process, no more than one continuance of a hearing and no more than one extension of time for filing of pleadings shall be granted. No continuance of any hearing other than adjournment from day to day shall be granted by a Hearing Committee after the hearing has commenced, except for reasons that would work an extreme hardship in the absence of a continuance; provided further the Chairman of the Disciplinary Hearing Commission may continue a hearing on his own motion, or by motion of either party, in order to await the filing of a controlling decision of an appellate court.

(12) The defendant shall appear in person before the Hearing Committee at the time and place named by the Chairman. The hearing shall be open except that for good cause shown the Chairman of the Hearing Committee may exclude from the hearing room all persons except the parties, Counsel, and those engaged in the hearing. No hearing shall be closed to the public over the objection of the defendant. The defendant shall, except as otherwise provided by law, be competent and compellable to give evidence in behalf of either of the parties. The defendant may be represented by Counsel, who shall enter an appearance. Pleadings and proceedings before a Hearing Committee shall conform as nearly as is practicable with requirements of the Rules of Civil Procedure and for trials of non-jury civil causes in the Superior Courts except as otherwise provided hereunder.

(13) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing at the Office of the Secretary within the time limits, if any, for such filing. The date of receipt by the Office of the Secretary and not the date of deposit in the mails is determinative.

(13.1) All papers presented to the Disciplinary Hearing Commission for filing shall be on letter size paper ($8^1/_2$ x 11 inches) with the exception of exhibits. The Secretary shall require a party to refile any paper that does not conform to this size. This rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.

(14) When a defendant appears in his own behalf in a hearing he shall file with the Office of the Secretary, with proof of delivery of a copy to the Coun-

sel, an address at which any notice or other written communication required to be served upon him may be sent, if such address differs from that last reported to the Secretary by the defendant.

(15) When a defendant is represented by Counsel in a hearing, Counsel shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, a written notice of such appearance which shall state his name, address and telephone number, the name and address of the defendant on whose behalf he appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the Counsel of record for such defendant at the stated address of the Counsel in lieu of transmission to the defendant.

(16) The Hearing Committee shall have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Such process shall be issued in the name of the Committee by its Chairman, or the Chairman may designate the Secretary of The North Carolina State Bar to issue such process. The defendant shall have the right to invoke the powers of the Committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(17) In any hearing admissibility of evidence shall be governed by the rules of evidence applicable in the Superior Court of the State at the time of the hearing. The Chairman of the Hearing Committee shall rule on the admissibility of evidence, subject to the right of any member of the Hearing Committee to question his ruling and, in the event of such question, the entire Hearing Committee shall then rule on the matter of evidence in question.

(18) If the Hearing Committee finds that the charges of misconduct are not established by clear, cogent and convincing evidence, it shall enter an order dismissing the complaint. If the Hearing Committee finds that the charges of misconduct are established by clear, cogent and convincing evidence, the Hearing Committee shall enter an order for discipline. In either instance, the Committee shall file a separate order which shall include the Committee's findings of fact and conclusions of law.

(18.1) The Secretary will provide that a complete record shall be made of the evidence received during the course of all hearings before the Disciplinary Hearing Commission as provided by G.S. 7A-95 for trials in the Superior Court. The Secretary will preserve the record and the pleadings, exhibits and briefs of the parties. The Secretary shall provide that the record will be transcribed as required.

(19) If the charges of misconduct are established, the Hearing Committee shall then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this State or any other jurisdiction and any evidence in mitigation of the offense. A summary of this evidence shall accompany the transcript of the hearing.

(19.1) In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the Disciplinary Hearing Commission shall retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the Counsel receives information tending to show that a condition has been violated, he may, with the consent of the Chairman of the Grievance Committee, file a motion in the cause with the Secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of a condition. The Counsel shall also serve a copy of any such motion upon the defendant. The Secretary shall promptly transmit the motion to the Chairman of the Disciplinary Hearing Commission who, if he enters an order to show cause, shall appoint a Hearing Committee as provided in Section 8(A)(2), appointing the members of the Hearing Committee that originally heard the matter wherever practicable, schedule a time and a place for a hearing, and notify the Counsel and the defendant of the composition of the Hearing Committee and the time and place for the hearing. After such a hearing, the Hearing Committee may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that The North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the Hearing Committee finds that The North Carolina State Bar has not carried its burden, then it shall enter an order continuing the stay. In any event, the Hearing Committee shall include in its order Findings of Fact and Conclusions of Law in support of its decision.

(20) All reports and orders of the Hearing Committee shall be signed by the members of the committee or by the Chairman of the Hearing Committee on behalf of the Hearing Committee and shall be filed with the Secretary. The copy to the defendant shall be served by registered or certified mail, return receipt requested. If the defendant's copy mailed by registered or certified mail is returned as unclaimed, or undeliverable, then service shall be as provided in Rule 4 of the Rules of Civil Procedure.

(21) Repealed. (Amended May 11, 1977; June 6, 1978; November 13, 1980; May 4, 1982; August 28, 1984.)

Editor's Note. — As to the board of trustees of the client security fund, see Art. VI, § 5(l) of these rules.

CASE NOTES

Where parties stipulated that defendant failed to file answer to the complaint served on him, and the record reflects that the defendant did not appear in person or through counsel at the hearing, under section (6) of this rule, the allegations of the complaint were deemed admitted. North Carolina State Bar v. Combs, 44 N.C. App. 447, 261 S.E.2d 207, cert. denied and appeal dismissed, 299 N.C. 740, 267 S.E.2d 663 (1980).

Applied in North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982); North Carolina State Bar v. Sheffield, 73 N.C. App. 349, 326 S.E.2d 320 (1985).

Cited in North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983).

§ 15. Effect of a Finding of Guilt in Any Criminal Case.

(1) Any member of The North Carolina State Bar convicted of a serious crime in any state or federal court, whether such a conviction results from a plea of guilty or nolo contendere or from a verdict after trial, shall, upon the conviction becoming final by affirmation on appeal or expiration of the time within which to perfect an appeal, an appeal not having been perfected, be suspended from the practice of law pending the disposition of any disciplinary proceeding in progress or commenced upon such conviction.

(2) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(3) Upon the receipt of a certificate of conviction of a member of a serious crime, the Grievance Committee will immediately authorize the filing of a complaint if one is not then pending. In the hearing on such complaint the sole

issue to be determined will be the extent of the final discipline to be imposed: Provided, that no hearing based solely upon a certificate of conviction will commence until all appeals from the conviction are concluded.

(4) Upon the receipt of certificate of conviction of a member for a crime not constituting a serious crime, the Grievance Committee will commence whatever action, including the filing of a complaint, it may deem appropriate.

§ 16. Reciprocal Discipline.

(1) Upon receipt of a certified copy of an order demonstrating that a member of The North Carolina State Bar has been disciplined in another jurisdiction, the Grievance Committee shall forthwith issue a notice directed to the accused attorney containing a copy of the order from the other jurisdiction, and an order directing that the accused attorney inform the Committee within 30 days from service of the notice, of any claim by the accused attorney that the imposition of the identical discipline in this State would be unwarranted, and the reasons therefor. This notice is to be served on the accused attorney in accordance with the provisions of G.S. 1A-1, Rule 4.

(2) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this State shall be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (1) above, the Grievance Committee shall impose the identical discipline unless the accused attorney demonstrates:

(a) That the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) There was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not consistently with its duty accept as final the conclusion on that subject; or

(c) That the imposition of the same discipline would result in grave injustice; or

(d) That the misconduct established has been held to warrant substantially different discipline in this State.

Where the Grievance Committee determines that any of said elements exist, the Committee shall dismiss the case or direct that a complaint be filed.

(4) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish the misconduct for purposes of a disciplinary proceeding in this State.

§ 17. Surrender of License While Proceeding Pending.

(1) A member who is the subject of an investigation into allegations of misconduct on his part may tender his license to practice, but only by delivering to the Council an affidavit stating that he desires to resign and that:

(a) The resignation is freely and voluntarily rendered; is not the result of coercion or duress; and the member is fully aware of the implications of submitting the resignation;

(b) The member is aware that there is presently pending investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which shall specifically be set forth;

(c) The member acknowledges that the material facts upon which the complaint is predicated are true; and

(d) The resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation the member could not successfully defend against them.

(2) The Council may accept a member's resignation only if: (a) the affidavit required under (1) above satisfies the requirements stated therein, or (b) upon full waiver of all future right to apply for reinstatement of license as an attorney. If the Council accepts a member's resignation it shall enter an order disbarring the member unless the member has requested in his affidavit that discipline be determined by the Disciplinary Hearing Commission, in which case the Secretary shall refer the matter to the Chairman of the Disciplinary Hearing Commission for hearing.

(3) Whenever any matter is referred to the Disciplinary Hearing Commission pursuant to (2) above, the Chairman shall appoint a Hearing Committee as provided in Section 8(A)(2), schedule a time and place for a hearing, and notify the Counsel and the resigning member of the composition of the Hearing Committee and the time and place of the hearing. The hearing shall be as contemplated in Section 14(19) and shall result in an order of the Disciplinary Hearing Commission imposing discipline and taxing costs against the resigning member.

(4) The order suspending or disbarring the member on consent shall be a matter of public record. However, the affidavit required under (1) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of a court or the Council. (Amended August 28, 1984.)

§ 18. Disability Hearings.

(1) Where a member of The North Carolina State Bar has been judicially declared incompetent or otherwise incapacitated or has been committed voluntarily or involuntarily to a hospital for the mentally disordered under the provisions of Chapter 122 of the General Statutes or similar laws of any jurisdiction, the Council, upon proper proof of the fact, shall enter an order transferring such member to inactive status effective immediately and for an indefinite period until the further order of the Council. A copy of such order shall be served upon such member, his guardian, or the director of the institution to which the member has been committed.

(2) When evidence has been obtained that a member of The North Carolina State Bar has become disabled, the Grievance Committee shall conduct a hearing in a manner that shall conform as nearly as is possible to the procedures set forth in § 13 of this Article. The Grievance Committee shall determine whether a petition alleging disability will be filed in the name of The North Carolina State Bar by the Chairman of the Grievance Committee.

(3) Whenever the Grievance Committee files a petition alleging the disability of a member, the Chairman of the Hearing Commission shall appoint a Hearing Committee as provided in §§ 8(A) (2) and 14 (4) to determine whether such member is disabled. The Hearing Committee shall conduct a hearing on the petition and receive whatever evidence it deems necessary or proper, including the examination of the member by such qualified medical experts as the Hearing Committee shall designate. If, upon due consideration of the matter, the Hearing Committee concludes that the member is disabled, it shall enter an order transferring the member to inactive status on the ground of such disability for an indefinite period and until the further order of the Council. Any hearing in a pending disciplinary proceeding against the member shall be held in abeyance. The Hearing Committee shall provide for such notice to the member of proceedings in the matter as it deems proper and

advisable and may appoint an attorney to represent the member if he or she is without adequate representation.

(4) In any proceeding seeking a transfer to inactive status under this section, the burden of proof shall be on the petitioner.

(5) If, during the course of a disciplinary proceeding, the defendant contends that he is suffering from a disability which makes it impossible for him to defend adequately, the proceeding shall be held in abeyance pending a determination by the Hearing Committee whether such disability exists. If the Hearing Committee concludes that such disability does exist, the disciplinary proceeding shall be held in abeyance until the Hearing Committee shall determine that such disability has been removed. If the Hearing Committee shall determine that the disability contended by the defendant is also one defined in § 3 (12) [§ 3 (14)], it shall proceed under the provisions of (3) above as if a petition alleging such disability had been filed by the Grievance Committee. If as a result of such proceeding, the defendant is transferred to inactive status, the disciplinary proceeding shall be held in abeyance as long as the defendant remains in inactive status. If thereafter the defendant is returned to active status by the Council and a Hearing Committee determines that he is able to defend adequately, it may resume the disciplinary proceeding.

Editor's Note. — Chapter 122, referred to above, was repealed by Session Laws 1985, c. 589, s. 1, effective January 1, 1986. See now Chapter 122C.

§ 19. Enforcement of Powers.

In proceedings before any committee, if any person refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or refuses to obey an order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing the Counsel or Secretary may apply to the appropriate court for an order directing that person to take the requisite action.

§ 20. Notice to Accused of Action and Dismissal.

In every disciplinary case wherein the accused attorney has received a Letter of Notice, and the grievance has been dismissed, the accused attorney shall be notified of the dismissal by letter by the Chairman of the Grievance Committee. The Chairman shall have discretion to give similar notice to the accused attorney in cases wherein a Letter of Notice has not been issued but the Chairman deems such notice to be appropriate.

§ 21. Notice to Complainant.

(1) If the Grievance Committee finds probable cause, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and has been referred to the Disciplinary Hearing Commission for hearing.

(2) If final action on a grievance is taken by the Grievance Committee in the form of a Letter of Caution, or a private reprimand, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and that final action has been taken thereon but

that the result is confidential and may be disclosed only upon the order of a court. If final action on a grievance is a dismissal, complainant and accused attorney shall be so notified. (Amended January 21, 1978.)

§ 22. Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies or Is Transferred to Inactive Status Because of Disability.

(1) Whenever a member of The North Carolina State Bar has been transferred to inactive status because of incapacity or disability, or disappears, or dies, and no partner, personal representative or other party capable of conducting the attorney's affairs is known to exist, the Senior Resident Judge of the superior court in the district wherein is located the last address on the register of members, if it is in this State, shall be requested by the Secretary to appoint an attorney or attorneys to inventory the files of the inactive, disappeared or deceased member and to take such action as seems indicated to protect the interests of the inactive, disappeared or deceased member and his or her clients.

(2) Any member so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the court which appointed the attorney to make such inventory, or to assume the representation of any such client.

§ 23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.

(A) (1) *Reprimand.* A letter of reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the hearing committee of the Disciplinary Hearing Commission depending upon the agency ordering the reprimand. The letter of reprimand shall be served upon the accused attorney or defendant and a copy shall be filed with the Secretary and shall be considered confidential.

(2) *Public Censure, Suspension, or Disbarment.* The Chairman of the hearing committee of the Disciplinary Hearing Commission or the Chairman of the Grievance Committee shall file the order of public censure, suspension or disbarment with the Secretary. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disciplined member and filed with the Clerk of the Supreme Court of North Carolina. A judgment of suspension or disbarment shall be effective throughout the State.

(B) Upon the final determination of incapacity or disability the President of the Council or the Chairman of the Disciplinary Hearing Commission, depending upon the agency entering the order, shall file with the Secretary a copy of the order transferring the member to inactive status. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disabled member and also upon the minutes of the Supreme Court of North Carolina. (Amended May 11, 1977; January 24, 1978; June 6, 1978; March 6, 1984; January 30, 1985.)

§ 24. Disbarred or suspended attorneys; winding up of practice, notice to clients; effective date of suspension or disbarment; condition precedent to reinstatement.

(1) A disbarred or suspended member of The North Carolina State Bar shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of the disbarment or suspension and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and shall advise such clients to seek legal advice elsewhere.

(2) A disbarred or suspended member shall promptly notify, or cause to be notified by registered or certified mail, return receipt requested, each client who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding of the disbarment or suspension and consequent inability to act as an attorney after the effective date of the disbarment or suspension. The notice to be given to the client shall recommend the prompt substitution of another attorney or attorneys in the case.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended member to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(3) Orders imposing suspension or disbarment shall be effective thirty days after being served upon the defendant. The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period from the entry date of the order to its effective date the member may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(4) Within ten days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney shall file with the Secretary an affidavit showing that he or she has fully complied with the provisions of the order and with the provisions of this section, and all other state, federal and administrative jurisdictions to which he or she is admitted to practice. Such affidavit shall also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(5) The disbarred or suspended member shall keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section shall be a condition precedent to any petition for reinstatement. (Amended August 28, 1984.)

§ 25. Reinstatement.

(A) After disbarment:

(1) No person who has been disbarred may have his license restored but upon order of the Council after the filing of a verified petition for reinstatement and the holding of a hearing before a hearing committee of the Disciplinary Hearing Commission as provided herein.

(2) No person who has been disbarred may petition for reinstatement until the expiration of at least five years from the effective date of the disbarment.

(3)(a) The petitioner shall have the burden of proving the following by clear, cogent and convincing evidence:

(1) That he possesses the moral qualifications required for admission to practice law in this state;
(2) That his resuming the practice of law within the state will be neither detrimental to the integrity and standing of the bar, nor the administration of justice, nor subversive of the public interest;
(3) That he is a citizen, or that his citizenship has been restored if he has been convicted of a felony;
(4) That he has complied with Section 24 of these rules;
(5) That he has complied with all applicable orders of the Disciplinary Hearing Commission and the Council;
(6) That he has complied with the orders and judgments of any court relating to the matters resulting in the disbarment;
(7) That he has not engaged in the unauthorized practice of law during the period of disbarment;
(8) That he has not engaged in any conduct during the period of disbarment constituting grounds for discipline under N.C. General Statute § 84-28(b); and
(9) That he exhibits knowledge and understanding of the current Code of Professional Responsibility.

(b) If less than seven (7) years has elapsed between the effective date of disbarment and the filing of the petition for reinstatement, the petitioner shall also have the burden of proving by the greater weight of the evidence that he has the competency and learning in the law required to practice law in this state. Factors which may be considered in deciding this issue include: experience in the practice of law, areas of expertise, certification of expertise, participation in continuing legal education programs, periodic review of advance sheets and legal periodicals, and the attainment of a passing grade on a regularly scheduled written bar examination administered by The North Carolina Board of Law Examiners and taken voluntarily by the petitioner.

(c) If seven (7) years or more has elapsed between the effective date of disbarment and the filing of the petition for reinstatement, reinstatement shall be conditioned upon the petitioner's attaining a passing grade on a regularly scheduled written bar examination administered by The North Carolina Board of Law Examiners.

(4)(a) Verified petitions for reinstatement of disbarred attorneys shall be filed with the Secretary. Upon receipt of the petition, the Secretary shall transmit the petition to the Chairman of the Disciplinary Hearing Commission and serve a copy on the Counsel. The Chairman shall within seven (7) days appoint a Hearing Committee as provided in Section 8(A)(2), schedule a time and place for hearing, and notify the Counsel and the petitioner of the composition of the Hearing Committee and the time and place of the hearing, which shall be conducted in accordance with The North Carolina Rules of Civil Procedure for non-jury trials in so far as possible and the Rules of Evidence applicable in Superior Court.

(b) As soon as possible after the conclusion of the hearing, the Hearing Committee shall file a report containing its findings, conclusions, and recommendations to the Council. This report shall be promptly transmitted to the Council.

(c) The whole record shall be transmitted to the Council unless the record is shortened by agreement of both the petitioner and Counsel.

(5) The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(6) The Council in its discretion may direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

(7) No person who has been disbarred and has unsuccessfully petitioned for reinstatement may reapply until the expiration of one (1) year from the date of the last order denying reinstatement.

(B) After suspension:

(1) No attorney who has been suspended may have his license restored but upon order of the Disciplinary Hearing Commission or the Secretary after the filing of a verified petition as provided herein.

(2) No attorney who has been suspended is eligible for reinstatement until the expiration of the period of suspension and, in no event, until thirty (30) days have elapsed from the date of filing the petition for reinstatement. Petitions for reinstatement may be filed no sooner than ninety (90) days prior to the expiration of the period of suspension.

(3) Any suspended attorney seeking reinstatement must file a verified petition with the Secretary, a copy of which the Secretary shall transmit to the Counsel. The petitioner must have satisfied the following requirements to be eligible for reinstatement and facts demonstrating satisfaction must be set forth in the petition:

(a) Compliance with Section 24 of the rules;

(b) Compliance with all applicable orders of the Disciplinary Hearing Commission and the Council; and

(c) Abstention from the unauthorized practice of law during the period of suspension.

(4) The Counsel shall conduct any necessary investigation regarding the compliance of the petitioner with the requirements set forth in Section 25(B)(3), and the Counsel may file a response to the petition with the Secretary prior to the date the petitioner is first eligible for reinstatement. The Counsel shall serve a copy of any response filed upon the petitioner.

(5) If the Counsel does not file a response to the petition prior to the date the petitioner is first eligible for reinstatement, then the Secretary shall issue an order of reinstatement.

(6) If the Counsel does file a timely response to the petition, such response must set forth specific objections supported by factual allegations sufficient to put the petitioner on notice of the events and occurrences at issue.

(7) The Secretary shall, upon the filing of a response to the petition, refer the matter to the Chairman of the Disciplinary Hearing Commission. The Chairman shall within seven (7) days appoint a Hearing Committee as provided in Section 8(A)(2), schedule a time and place for a hearing, and notify the Counsel and the petitioner of the composition of the Hearing Committee and the time and place of the hearing. The hearing shall be conducted in accordance with the North Carolina Rules of Civil Procedure for non-jury trials in so far as possible and the Rules of Evidence applicable in Superior Court.

(8) The Hearing Committee shall determine whether or not the petitioner's license should be reinstated and enter an appropriate order which may in-

clude additional sanctions in the event violations of the petitioner's order of suspension are found. In any event, the Hearing Committee must include in its order findings of fact and conclusions of law in support of its decision and tax such costs as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition against the petitioner.

(C) After transfer to inactive status because of disability:

(1) No member of The North Carolina State Bar transferred to inactive status because of incapacity or disability may resume active status until reinstated by order of the Council. Any member transferred to inactive status because of incapacity or disability shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as is stated in the order transferring the member to inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to inactive status because of disability shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. The Chairman shall appoint a Hearing Committee as provided in §§ 8 (A) (2) and 14 (4). The Hearing Committee shall promptly schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that the disability has been removed and the petitioner is fit to resume the practice of law. Upon such petition the Hearing Committee may take or direct such action as it deems necessary or proper to a determination of whether the disability has been removed, including a direction for an examination of the petitioner by such qualified medical experts as the Hearing Committee shall designate. In its discretion, the Hearing Committee may direct that the expense of such an examination shall be paid by the petitioner. At the conclusion of the hearing, the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record, to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(3) Where a member has been transferred to inactive status by an order of the Council based on incapacity as defined in § 3 (17) [§ 3 (18)] or after commitment on the grounds of incompetency and thereafter, in proceedings duly taken, the member has been judicially declared to be competent or the incapacity has been removed, the Council may dispense with further evidence that the incapacity has been removed and may direct his or her reinstatement to active status upon such terms as are deemed proper and advisable.

(4) The filing of a petition for reinstatement to active status by a member of The North Carolina State Bar transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of the disability. The petitioner shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the petitioner has been examined or treated since transfer to inactive status and shall furnish to the Secretary written consent to each to divulge such information and records as requested by the Counsel or a Hearing Committee. (Amended May 11, 1977; August 28, 1984.)

§ 26. Address of Record.

Except where otherwise specified, any provision herein for notice to an accused attorney or a defendant shall be deemed satisfied by appropriate correspondence addressed to that attorney by registered mail at the last address entered in the register of members provided for in Article II, § 1 of these rules.

§ 27. Disqualification Due to Interest.

No member of the Council or Hearing Commission shall participate in any disciplinary matter involving such member, any partner or associate in the practice of law of such member, or in which such member has a personal interest.

§ 28. Trust Accounts; Audit.

(1) For reasonable cause, the Chairman of the Grievance Committee is impowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Code of Professional Responsibility for inspection, copying, or audit by the Counsel or his staff. For the purposes of this rule, any of the following shall constitute reasonable cause:

(a) Any sworn statement of grievance received by The North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(b) Any facts coming to the attention of The North Carolina State Bar, whether through random review as contemplated by subpart (2) of this rule or otherwise, which, if true, would constitute a probable violation of any provision of the Code of Professional Responsibility concerning the handling of client funds or property.

(c) Any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude.

The grounds supporting the issuance of any such subpoena shall be set forth upon the face of the subpoena.

(2) The Chairman of the Grievance Committee may randomly issue investigative subpoenas to members compelling the production of any records required to be kept relative to the handling of client funds or property by the Code of Professional Responsibility for inspection by the Counsel or his staff to determine compliance with the procedures and record-keeping requirements established by the Code of Professional Responsibility. Prior to the issuance of any such subpoena, procedures for random selection shall be adopted by the Council. Any such subpoena shall disclose upon its face its random character and contain a vertification of the Secretary that it was issued in accordance with the procedures referred to above. No member shall be subject to random selection under this sub-section more frequently than once in three years.

(3) No subpoena issued pursuant to this rule may compel production within five days of service.

(4) The Rules of Evidence applicable in the Superior Courts of the state shall govern the use of any material subpoenaed pursuant to this rule in any hearing before the Disciplinary Hearing Commission. Where practicable, notice of The North Carolina State Bar's intended use at hearing of any such materials shall be given to any client involved, unless such client is already aware of such intended use, and, upon good cause shown by such client, the admission of the same shall be under such conditions as shall be reasonably

calculated thereafter to protect the confidences of such client. Permissible means of protection shall not prejudice the subject attorney and may include, but are not limited to, excision, in camera production, retention in sealed envelopes, or similar devices.

(5) No assertion of attorney-client privilege or confidentiality shall operate to prevent an inspection or audit of a trust account as provided in this rule. (Amended August 29, 1984.)

§ 29. Confidentiality.

All proceedings involving allegations of misconduct by an attorney shall remain confidential until the complaint against an accused attorney has been filed with the Secretary of The North Carolina State Bar as a result of the Grievance Committee of The North Carolina State Bar having found that there is probable cause to believe that said accused attorney is guilty of misconduct justifying disciplinary action, or the accused attorney requests that the matter be public prior to the filing of the aforementioned complaint, or the investigation is predicated upon a conviction of the accused attorney of a crime, except the previous issuance of a private reprimand to an accused attorney may be revealed in any subsequent disciplinary proceeding. In matters involving alleged disability, all proceedings shall be kept confidential unless and until the Council or a Hearing Committee of the Disciplinary Hearing Commission enters an order transferring the member to inactive status.

This provision shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or to law-enforcement agencies investigating qualifications for government employment. In addition, the Secretary shall transmit notice of all public discipline imposed, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association. (Amended November 3, 1978; March 6, 1984.)

Article X.

Filing Papers with and Serving The North Carolina State Bar.

§ 1. When Papers Are Filed under These Rules and Regulations.

Whenever in these rules and regulations there is a requirement that petitions, notices or other documents be filed with or served on The North Carolina State Bar, or the council, the same shall be filed with or served on the Secretary of The North Carolina State Bar.

ARTICLE XI.

Seal.

§ 1. Form and Custody of Seal.

The North Carolina State Bar shall have a seal round in shape and having the words and figures, "The North Carolina State Bar — July 1, 1933," with the word "Seal" in the center. The seal shall remain in the custody of the Secretary-Treasurer at the office of The North Carolina State Bar, unless otherwise ordered by the Council.

ARTICLE XII.

Election and Appointment of State Bar Councilors.

§ 1. Purpose.

The purpose of these rules is to promulgate fair, open, and uniform procedures to elect and appoint North Carolina State Bar Councilors in all judicial district bars. These rules should encourage a broader and more diverse participation and representation of all attorneys in the election and appointment of Councilors. (Added July 26, 1985.)

§ 2. Election — When Held; Notice; Nominations.

Every Judicial District Bar, in any calendar year at the end of which the term of one of more of its Councilors will expire, shall file said vacancy or vacancies at an election to be held at a meeting during that year.

(1) The officers of the District Bar shall fix the time and place of such election and shall give to each active member (as defined in G.S. 84-16) of the District Bar a written notice thereof directed to him or her at his or her address on file with the North Carolina State bar, which notice shall be placed in the United States mail, postage prepaid, at least thirty days prior to the date of the election.

(2) The District Bar shall submit its written notice of the election to the North Carolina State Bar, at least six weeks before the date of the election.

(3) The North Carolina State Bar will, at its expense, mail these notices.

(4) The notice shall state the date, time and place of the election, give the number of vacancies to be filled, name a person or committee named by the local bar to which nominations may be made prior to the meeting, advise that additional nominations may be made from the floor at the meeting itself, and advise that all elections must be by a majority of the votes cast by those present and voting. (Added July 26, 1985.)

§ 3. Same — Voting Procedures.

All nominations made either before or at the meeting shall be voted on at the meeting by secret ballot of those present and voting.

(1) Cumulative voting shall not be permitted.

(2) Nominees receiving a majority of the votes cast shall be declared elected. (Added July 26, 1985.)

§ 4. Vacancies.

The unexpired term of any vacancy occurring in the office of Councilor because of resignation, death or any cause other than the expiration of a term, shall be filled within ninety days of the occurrence of the vacancy by an election conducted in the same manner as above provided. (Added July 26, 1985.)

§ 5. By-Laws Providing for Geographical Rotation or Division of Representation.

Nothing contained herein shall prohibit the District Bar of any Judicial District from adopting by-laws providing for the geographical rotation or division of its Councilor representation. (Added July 26, 1985.)

APPENDIX A.

PROCEDURES FOR RULING ON QUESTIONS OF LEGAL ETHICS

Editor's Note. — As to the committee on legal ethics and professional conduct, see Art. VI, § 5(b) of these rules.

(A) Definitions

(1) "Attorney" shall mean any active member of the Bar.

(2) "Bar" shall mean The North Carolina State Bar.

(3) "Chairman" shall mean the Chairman, or in his absence the Vice-Chairman, of the Ethics Committee of the Bar.

(4) "Citizen" shall mean any person, firm or corporation residing in North Carolina who is not an attorney as above defined.

(5) "Committee" shall mean the Ethics Committee of the Bar.

(6) "Council" shall mean the Council of the Bar.

(7) "Ethics Advisory" shall mean an informal legal ethics ruling issued by the Executive Director under the supervision of the Ethics Committee. The advisories shall be designated by the letters "EA," numbered and kept on file at the Bar's headquarters.

(8) "Ethics Decision" shall mean a ruling by the Council in response to a request for a Legal Ethics Opinion which, because of its special facts or for other reasons, does not warrant issuance of a published opinion. The decisions shall be designated by the letters "ED," numbered, and kept on file at the Bar's headquarters.

(9) "Executive Director" shall mean the Executive Director of the Bar or, in his absence, his designee.

(10) "Grievance Committee" shall mean the Grievance Committee of the Bar.

(11) "Legal Ethics Opinion" shall mean an opinion issued by the Council to provide ethical guidance for attorneys and to establish a principle of ethical conduct. Such opinions are published and designated by the letters "CPR" with a number to identify them as interpretations of the Code of Professional Responsibility.

(12) "President" shall mean the President of the State Bar or, in his absence, the presiding officer of the Council.

(13) "Published" shall mean published in The North Carolina State Bar Quarterly.

(B) Requests for Legal Ethics Opinions and Ethics Advisories (General Provisions)

(1) Any attorney or citizen may request the Bar to rule on actual or contemplated professional conduct of an attorney in the form and manner provided hereinafter. The grant or denial of the requests rests with the discretion of the Executive Director, Committee or the Council.

(2) Attorneys may initiate a request for an Ethics Advisory either in writing, by telephone or in person regarding conduct which they contemplate and in good faith believe is either a routine matter or requires urgent action in order to protect some legal right, privilege or interest. If the request is initiated verbally, the requesting attorney must promptly confirm his request in writing.

(3) A request for an Ethics Advisory, Ethics Decision or Legal Ethics Opinion shall present in detail to the Executive Director all operative facts upon which the request is based. All requests for either a legal Ethics Opinion or an Ethics Decision shall be made in writing.

(4) Any citizen may request either a Legal Ethics Opinion or an Ethics Decision through any Councilor of the Judicial District of his residence or principal place of business except when the request is regarding the propriety of said Councilor's conduct, in which case the citizen may make the request through another Councilor in the district or a Councilor in an adjoining Judicial District.

(5) Any attorney, including a Councilor acting pursuant to paragraph (4) hereinabove, who requests either a Legal Ethics Opinion or an Ethics Decision concerning acts or contemplated professional conduct of another attorney, shall state the name of that attorney and identify all persons who the requesting attorney has reason to believe would be substantially affected by the question or questions advanced. The Councilor, acting pursuant to subsection (4) hereinabove shall also ask the requesting citizen to inform him of any attorney who the requesting citizen has reason to believe would be substantially affected by the question or questions advanced. The Councilor shall exercise good faith in preparing the request on behalf of the citizen.

(6) If an attorney willfully fails to identify an attorney who the requesting attorney has reason to believe would be substantially affected by the requested Ethics Advisory, Legal Ethics Opinion, or Ethics Decision, his willful failure may be treated as misconduct. The requesting attorney shall receive no right, benefit, or immunity under any opinion which has been issued under such circumstances, and the opinion shall be reexamined de novo under the procedures delineated in section (D) hereinbelow.

(C) Ethics Advisories

(1) An Ethics Advisory answers an inquiry by an attorney regarding his own contemplated conduct when the attorney needs an expeditious ethics ruling on either a routine matter or under exigent circumstances and has complied with section (B) hereinabove.

(2) Upon receipt of either a written or verbal request from an attorney for an Ethics Advisory, the Executive Director acting under the supervision and direction of the Ethics Committee, may either honor the request or deny it. If the Executive Director honors the request, he shall communicate his ruling to the inquirer. The action on the request shall be either written or verbal with prompt confirmation in writing. Action on the request shall be taken within a reasonable time. Neither the denial nor issuance of an advisory nor the ruling itself shall be appealable.

(3) An Ethics Advisory issued by the Executive Director shall be promulgated under the authority of the Ethics Committee and in accordance with such guidelines as the Ethics Committee may establish and prescribe from time to time.

(4) An Ethics Advisory shall sanction or disapprove only the matter in issue, not otherwise serve as precedent and not be published.

(5) Ethics Advisories shall be reviewed periodically by the Committee. If, upon review, a majority of the Committee present and voting decides that an Ethics Advisory should be withdrawn, the requesting attorney shall be notified in writing of the Committee's decision by the Executive Director. Until such notification, the attorney shall be deemed to have acted ethically and in good faith if he acts pursuant to the Ethics Advisory which is later withdrawn.

(6) An attorney requesting a Legal Ethics Opinion or Ethics Decision, subsequent to requesting an Ethics Advisory on the same question, shall state that an advisory was sought, specify the nature of the advisory provided and attach copies of all relevant correspondence between the attorney and the Bar.

(7) If either the Executive Director declines to issue an Ethics Advisory, or the requesting attorney disagrees with the issued advisory, or the advisory is withdrawn by the Committee, an attorney has the right to proceed de novo under the procedures delineated in section (D).

(D) Legal Ethics Opinions and Decisions

(1) Requests for Legal Ethics Opinions or Ethics Decisions shall be made in writing and submitted to the Executive Director who, after determining that the request is in compliance with section (B), shall transmit the requests to the Chairman of the Ethics Committee.

(2) If a Legal Ethics Opinion or Ethics Decision is requested concerning contemplated or actual conduct of another attorney, the Chairman shall notify that attorney and provide him or her with the opportunity to be heard, along with the person who requested the opinion, under such guidelines as may be established by the Committee. The Chairman shall notify any additional person or group he deems appropriate and provide them an opportunity to be heard.

(3) The Committee shall prepare a written proposed Legal Ethics Opinion or Ethics Decision which shall state its conclusion in respect to the question asked and the reasons therefor.

(4) The proposed Legal Ethics Opinion or Ethics Decision shall be provided to the interested persons and shall be transmitted to the President for consideration by the Council.

(5) At least thirty (30) days prior to the next regularly scheduled meeting of the Council, any interested person or group may submit a written request to be heard on the proposed opinion or decision. The Council, under such guidelines as it may adopt, may in its discretion allow or deny such request. Any attorney, whether permitted to appear before the Council or not, has the right to file a written brief with the Council under such rules as may be fixed aforesaid. The President may, in his discretion, permit any additional person or group to file a written brief.

(6) The Council's action on the proposed opinion shall be determined by vote of the majority of the Council present and voting. Notice of such action shall be provided to the interested persons.

(7) The Committee may on its own motion submit a proposed Legal Ethics Opinion to the Council for its consideration. Prior to action by the Council, the proposed opinion shall be published and an opportunity shall be provided for interested persons to request to be heard before the Council when the opinion is considered, subject to the provisions of subsection (5) above.

(8) A Legal Ethics Opinion or Ethics Decision may be reconsidered or withdrawn by the Council pursuant to rules which it may establish from time to time. Those persons who participated in the original proceedings shall be given an opportunity to request to be heard in connection with the reconsideration in accordance with subsection (5) above.

(9) When an ethics inquiry may amount to the statement of a grievance, the Executive Director, the Chairman or the President may either consider the request as seeking an ethics ruling or refer the matter to the Grievance Committee.

APPENDIX B.

PROCEDURES FOR THE COMMITTEE ON GRIEVANCES

Editor's Note. — As to the committee on grievances, see Art. VI, § 5(c) of these rules.

§ 1. It shall be the duty of the Committee on Grievances to investigate and study all complaints or allegations of misconduct which may be made against members of the State Bar. The Committee shall likewise have authority to investigate and study on its own motion all matters which may have come to its attention relating to alleged unprofessional conduct on the part of any member of The North Carolina State Bar. The Committee may include in its investigation all matters which may come to its attention with reference to the member complained of. It shall make a report to the Council at each quarterly meeting of the action taken by it upon all matters which have come to its attention, and its recommendations in regard thereto. If the recommendation of the Committee on Grievances is for dismissal of the charges, the report shall be private. It shall not be necessary to examine witnesses, but the Committee shall have authority to require affidavits or other statements in sufficient form and substance to satisfy it as to the probable truth of the charges contained in the complaint.

§ 2. The Secretary may require all complaints to be in the form of affidavits upon forms prepared for such purpose. Where the complaint or allegation on its face requires it, the Secretary shall obtain certified copies of court records, or verified copies of any other exhibit or exhibits, which shall accompany and be attached to the complaint. The provisions of this paragraph shall be directory only and not mandatory.

§ 3. All complaints or charges of misconduct lodged with the Secretary shall be immediately forwarded to the Chairman of the Grievances Committee for initial screening.

§ 4. If the Chairman of the Grievances Committee is of the opinion that the complaint should be entertained, he shall forthwith proceed to issue letter of notice to the accused attorney, setting forth the substance of the charges made against him in sufficient detail to enable such accused attorney to file an intelligent answer thereto, and notifying the accused attorney to file his preliminary answer to the charges within 15 days of the receipt of such letter of notice, and further advising such accused attorney that he may attach to his answer such exhibits as he may desire, which letter of notice shall be forwarded to such accused attorney by certified or registered mail. The answer need not be verified, but all exhibits attached thereto must be certified.

§ 5. Any action taken by the Chairman of the Grievances Committee shall be reviewed by the full Committee.

§ 6. After answer has been filed by the accused attorney, or the time for filing such answer has expired, the Grievances Committee shall consider the charges filed and make recommendation to the full Council.

§ 7. Where, in each case in which the Council votes action other than dismissal, the Secretary shall keep a docket on such case, listing thereon the action taken, the date thereof, and the progress of the case from the time of its original institution until its final conclusion.

APPENDIX C.

PROCEDURES FOR THE COMMITTEE ON UNAUTHORIZED PRACTICE

Editor's Note. — As to the committee on unauthorized practice, see Art. VI, § 5(e) of these rules.

§ 1. General Provisions.

The purpose for establishing a committee on the unauthorized practice of law and the reasons for the prohibition against the practice of law by those who have not been examined, found qualified to practice law and licensed to practice law is to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the Code of Professional Responsibility which in the public interest, lawyers are bound to observe.

§ 2. Proceeding for Prohibition of Unauthorized Practice of Law.

The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.

District Bars shall not conduct separate proceedings into unauthorized practice of law matters, but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged authorized practice of law.

§ 3. Definitions.

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

(1) Appellate Division: The Appellate Division of the General Court of Justice.

(2) Chairman of the Unauthorized Practice of Law Committee: councillor appointed to serve as chairman of the Unauthorized Practice of Law Committee of The North Carolina State Bar.

(3) Complainant or Complaining Witness: any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.

(4) Complaint: a formal pleading filed in the name of The North Carolina State Bar in the Superior Court against a person, firm or corporation after a finding of probable cause.

(5) Council: the Council of The North Carolina State Bar.

(6) Councillor: a member of The Council of The North Carolina State Bar.

(7) Counsel: the Counsel of The North Carolina State Bar appointed by the Council.

(8) Court or Courts of this State: a court authorized and established by the Constitution or laws of the State of North Carolina.

(9) Defendant: any person, firm or corporation against whom a complaint is filed after a finding of probable cause.

(10) Unauthorized Practice of Law Committee: the Unauthorized Practice of Law Committee of The North Carolina State Bar.

(11) Investigation: the gathering of information with respect to alleged unauthorized practice of law.

(12) Investigator: any person designated to assist in investigation of alleged unauthorized practice of law.

(13) Letter of Caution: communication from the Unauthorized Practice of Law Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.

(14) Letter of Notice: a communication to an accused individual or corporation setting forth the substance of the alleged conduct involving unauthorized practice of law.

(15) Office of the Counsel: the office and staff maintained by the Counsel of The North Carolina State Bar.

(16) Office of the Secretary: the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(17) Party: after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

(18) Plaintiff: after a complaint has been filed, The North Carolina State Bar.

(19) Preliminary Hearing: hearing by the Unauthorized Practice of Law Committee to determine whether probable cause exists.

(20) Probable Cause: a finding by the Unauthorized Practice of Law Committee that there is reasonable cause to believe that a person or corporation is guilty of unauthorized practice of law justifying legal action against such person or corporation.

(21) Secretary: the Secretary-Treasurer of The North Carolina State Bar.

(22) Supreme Court: the Supreme Court of North Carolina.

§ 4. State Bar Council — Powers and Duties in Discipline and Disability Matters.

The Council of The North Carolina State Bar shall have the power and duty:

(1) To supervise the administration of Unauthorized Practice of Law Committee in accordance with the provisions hereinafter set forth.

(2) To appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

§ 5. Chairman of the Unauthorized Practice of Law Committee — Powers and Duties.

(A) The Chairman of the Unauthorized Practice of Law Committee shall have the power and duty:

(1) To supervise the activities of the Counsel.

(2) To recommend to the Unauthorized Practice of Law Committee that an investigation be initiated.

(3) To recommend to the Unauthorized Practice of Law Committee that a complaint be dismissed.

(4) To direct a Letter of Notice to accused person or corporation.

(5) To notify an accused and any complainant that a complaint has been dismissed.

(6) To call meetings of the Unauthorized Practice of Law Committee for the purpose of holding preliminary hearings.

(7) To issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(8) To administer oaths or affirmations to witnesses.

(9) To file and verify complaints and petitions in the name of The North Carolina State Bar.

(B) The President, Vice-Chairman or senior Council member of the Unauthorized Practice of Law Committee shall perform the functions of the Chairman of the Unauthorized Practice of Law Committee in any matter when the Chairman is absent or disqualified.

§ 6. Unauthorized Practice of Law Committee — Powers and Duties.

The Unauthorized Practice of Law Committee shall have the power and duty:

(1) To direct the Counsel to investigate any alleged unauthorized practice of law by any person, firm or corporation in the State of North Carolina.

(2) To hold preliminary hearings, find probable cause and direct the complaints be filed.

(3) To dismiss complaints upon a finding of no probable cause.

(4) To issue a Letter of Caution to an accused in cases wherein unauthorized practice of law is not established but the activities of the accused are deemed to be improper or may become the basis for unauthorized practice of law if continued or repeated.

§ 7. Counsel — Powers and Duties.

The Counsel shall have the power and duty:

(1) To investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of complaint or otherwise.

(2) To recommend to the Chairman of the Unauthorized Practice of Law Committee that a matter be dismissed because the complaint is frivolous or falls outside the Council's jurisdiction; that a Letter of Notice be issued; or that the matter be passed upon by the Unauthorized Practice of Law Committee to determine whether probable cause exists.

(3) To prosecute all unauthorized practice of law proceedings before the Unauthorized Practice of Law Committee and the courts.

(4) To represent The North Carolina State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law.

(5) To appear on behalf of The North Carolina State Bar at hearings conducted by the Unauthorized Practice of Law Committee or any other agency or court concerning any motion or other matter arising out of an unauthorized practice of law proceeding.

(6) To employ assistant counsel, investigators, and other administrative personnel in such numbers as the Council may from time to time authorize.

(7) To maintain permanent records of all matters processed and the disposition of such matters.

(8) To perform such other duties as the Council may from time to time direct.

§ 8. Secretary — Powers and Duties in Unauthorized Practice of Law Matters.

The Secretary shall have the following powers and duties in regard to discipline and disability procedures:

(1) To receive complaints for transmittal to the Counsel.

(2) To issue summons and subpoenas when so directed by the President or the Chairman of the Unauthorized Practice of Law Committee.

(3) To maintain a record and file of all complaints not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Unauthorized Practice of Law Committee.

§ 9. Investigation; Initial Determination.

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Unauthorized Practice of Law Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the complaint as may be appropriate and submit to the Chairman of the Unauthorized Practice of Law Committee a report detailing the findings of the investigation.

(2) The Chairman of the Unauthorized Practice of Law Committee may: (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused in writing or otherwise; or (3) send a Letter of Notice to the accused party.

(3) If a Letter of Notice is sent to the accused individual or corporation, it shall be by registered mail and shall direct that a response be made within fifteen (15) days of receipt of the Letter of Notice.

(4) If a timely response to a Letter of Notice is made, the Chairman shall direct the Counsel to conduct further investigation or to terminate the investigation and place the item on the agenda for the next forthcoming Unauthorized Practice of Law Committee meeting.

(5) If, after the expiration of fifteen (15) days from the date of the receipt of the Letter of Notice, the individual or corporation has failed or refused to respond or has given a response that is insufficient to resolve the matter, the Chairman may direct Counsel to proceed to seek injunctive relief to enjoin such unauthorized practice pursuant to G.S. 84-37 or direct Counsel to notify the District Attorney of the Judicial District wherein the accused individual or corporation resides to bring injunctive or criminal proceedings against that individual or corporation pursuant to G.S. 84-7 et seq.

§ 10. Preliminary Hearing.

At the regular quarterly meeting of the Unauthorized Practice of Law Committee, the Committee shall consider all matters presented to it by Counsel and shall determine whether or not probable cause exists in each matter tending to establish that a person, firm or corporation is engaged in the unauthorized practice of law in North Carolina.

If no probable cause is found, the Committee shall recommend to the Council that the matter be dismissed. If probable cause is found the Committee shall then recommend to the Council that the matter be prosecuted in the General Court of Justice as by law provided.

APPENDIX D.

PROCEDURES FOR THE COMMITTEE ON LEGAL AID TO INDIGENTS AND REFERRALS

Editor's Note. — As to the committee on legal aid to indigents and referrals, see Art. VI, § 5(g) of these rules.

§ 1. For the purpose of implementation of these rules, the Council shall establish a standing committee to be designated as the Committee on Legal Aid to Indigents and Referrals, whose duties shall consist of aiding and assisting any and all districts of The North Carolina State Bar in establishing a plan for the representation of indigents in civil and certain criminal cases and lending assistance and advice in the carrying out of these programs in accordance with the laws of the State of North Carolina and the ethics of the legal profession. Such plans shall include not only matters involving litigation, but also matters involving consultation, advice, drafting of legal instruments and other legal services customarily rendered by attorneys to clients.

§ 2. Any District Bar as provided in G.S. 84-18 may adopt a plan for the naming and designation of the attorneys to serve as counsel for indigents in civil cases or in criminal cases not covered by Chapter 1080 of the Session Laws of 1963. Such plans may be applicable to the entire district or at the election of the District Bar separate plans may be adopted by the District Bar for use in each separate county within the district.

(a) Prior to the appointment of counsel in any civil case on grounds of indigency there shall first be a determination of indigency by a committee of the District Bar appointed for such purpose by the officers of the District Bar. In emergency situations, such as in the case of injunctions or habeas corpus proceedings to determine custody, and other similar situations where time is of the essence, the legal aid committee shall have authority to appoint counsel without awaiting a determination of indigency.

(b) For the purpose of determining indigency the District Bar shall appoint a committee or committees of its members to serve as a committee of the District Bar to be designated as Legal Aid Committee which shall determine upon appropriate forms whether or not an individual who has requested representation on the grounds of indigency is in fact an indigent. This committee may utilize as advisory members public officials of the community, or their designees, who may render assistance to the committee as they are called upon.

(c) An individual who desires representation of counsel upon the grounds that he is an indigent shall complete forms provided by the committee of legal aid for the district and the same shall be forwarded to the Legal Aid Committee for their consideration.

(d) Upon the basis of the individual's representations of indigency and such other information as may be brought to the attention of the Legal Aid Committee, the committee shall determine whether or not the individual is in fact an indigent, and if he is determined to be an indigent the committee shall appoint counsel to represent the individual in accordance with the plan so adopted for this purpose by the District Bar. Nothing contained herein shall require any attorney to accept appointment to represent an indigent person in any case. Any attorney accepting appointment to represent an indigent person under these rules and regulations shall stand in the attorney-client relationship to such indigent person in the same manner as if privately employed, and such attorney may withdraw from such representation in the same manner as attorneys privately employed.

§ 3. Such plan or plans as adopted by the District Bar shall be certified to the Council of The North Carolina State Bar before such plans are put into effect. Thereafter all appointments of counsel for indigents in said Districts shall be made in conformity with such plan or plans, unless in the exercise of the sound discretion of the Legal Aid Committee they deem it proper in the furtherance of justice to appoint as counsel for an indigent some lawyer or lawyers residing and practicing in the judicial district who is or are not on the plan or list certified to the Council of The North Carolina State Bar, and if so, the committee is authorized to appoint as counsel to represent said indigent some lawyers or lawyers not on said plan or list residing or practicing in the judicial district.

No attorney shall be appointed as counsel for an indigent in a court of any district except the district in which he resides or maintains an office except by consent of counsel so appointed.

No indigent shall be entitled or permitted to select or specify the attorney who shall be assigned to represent him.

The special committee of the district shall maintain and keep current the plan for the assignment of counsel applicable to said county as certified by the district bar in which such county is located.

All orders for the appointment of counsel shall be made a part of the file maintained by the special committee with appropriate copies being forwarded to the attorney so assigned.

§ 4. If the special committee shall so find that the request of the individual is not a proper one for representation as an indigent according to the plan of the district, then the individual shall be offered the services of a referral plan whereby the individual is referred to a lawyer or lawyers from a list of attorneys maintained for the purpose of referrals in such cases so provided.

The determination of whether or not the case is a proper one for representation as an indigent or on a referral basis shall be according to the rules prescribed by the district; provided, however, no fee producing case, workmen's compensation case, contingent fee case or the like, shall entitle such indigent to appointment of counsel.

§ 5. Representation of indigents under these Rules and Regulations shall be performed by attorneys at law duly licensed and authorized to practice in the State of North Carolina. The district bar may receive any and all funds, including but not limited to those emanating from the federal government or any agency thereof, appropriated, bequeathed or given to the district bar for the purpose of funding the costs of rendering legal services to the poor. Any and all funds so appropriated, bequeathed or given shall be deposited in a special account with the Secretary or Treasurer of the district bar acting as custodian of said funds to be disbursed in such manner as the Committee on Legal Aid and Referrals of the district bar may determine by rules and regulations concerning the same.

§ 6. Nothing herein shall prevent any attorney at law duly licensed and authorized to practice law in the State of North Carolina, or association of such attorneys, from conducting a legal aid clinic or legal aid programs, with or without compensation, for indigent persons separate and apart from the program of the district bar, so long as such legal aid clinic or legal aid program is conducted in accordance with the laws of the State of North Carolina and the Canons of Ethics and Rules and Regulations of The North Carolina State Bar.

§ 7. Nothing contained in these Rules and Regulations shall in any way restrict the right of any attorney at law duly licensed and authorized to practice law in the State of North Carolina to render gratuitious legal services to any person whom he considers to be indigent, without the requirement of prior determination of indigency by such committee of the district bar.

§ 8. Nothing contained in these rules shall in any wise affect the inherent powers of the courts of this state to deal with such matters and with attorneys, as officers of the courts of this state.

ARTICLES OF ASSOCIATION OF THE LEGAL AID SOCIETY OF .... COUNTY (........ DISTRICT)

THIS CERTIFIES that we, the undersigned natural persons of the age of twenty-one years or more, do hereby organize ourselves into an unincorporated association under the laws of the State of North Carolina, and to that end do hereby set forth:

I

The name of the association is THE LEGAL AID SOCIETY OF .... COUNTY (............ DISTRICT), hereinafter referred to as "the Society."

II

The purposes for which the Society is organized are: For benevolent and charitable purposes, legal aid to be rendered gratuitously, through attorneys at law, to or for indigents of .... County, (........... District), of North Carolina, who may appear worthy thereof and who are unable to procure legal assistance elsewhere; to assist the poor and needy in the pursuit of any civil remedy; and to thereby advance the cause of justice for all under the law.

III

The Society shall have the right and power:

A. To elect or appoint officers and agents of the Society, define their duties, and fix their compensation.

B. To make and alter by-laws, not inconsistent with these Articles of Association or with the laws of the State of North Carolina, for the administration and regulation of the affairs of the Society.

C. To make donations for the public welfare or for religious, charitable, scientific or educational purposes.

D. To indemnify any trustee or officer or former trustee or officer of the Society or any person who may have served at its request as a trustee or officer of another association or corporation, against expenses actually and necessarily incurred by him in connection with the defense of any action, suit, or proceeding in which he is made a party by reason of being or having been such trustee or officer, except in relation to matters as to which he shall be adjudged in such action, suit, or proceeding to be liable for negligence or misconduct in the performance of duties to the Society, but such indemnification shall not be deemed exclusive of any other rights to which such trustee or officers may be entitled, under any by-law, agreements, vote of the Board of Trustees of this Society, or otherwise. The Society shall have no power, directly or indirectly, to engage in political, lobbying or propagandistic activity.

E. To cease its activites and to dissolve voluntarily subject to the provisions of Article XI hereunder.

IV

In connection with carrying out the purposes for which the Society is organized, set forth in Article III, above, the Society shall also have power:

A. To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.

B. To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.

C. To acquire by purchase, subscription, gift, will or otherwise, and to own, hold, vote, use, employ, sell, mortgage, lend, pledge, administer or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, domestic or foreign corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality or of any instrumentality thereof.

D. To make contracts and incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property and income.

V

The Society shall consist of the signatures to these Articles of Association and their successors as herein provided, such persons to be hereinafter designated as the Board of Trustees.

VI

The affairs of the Society shall be managed by a Board of Trustees of fifteen members, all of whom shall be residents of (. . . . .) County, (. . . . . District) of North Carolina, and at least eight of whom shall be duly licensed practicing attorneys-at-law who are members in good standing of The North Carolina State Bar and the Bar of the (. . . . .) Judicial District. The Board of Trustees shall consist of one ex officio member and fourteen regular members. The regular members shall serve a term of two years. The ex officio member of the Board of Trustees shall be the duly elected and qualified President of the Bar of the (. . . . .) Judicial District of the State of North Carolina. Such ex officio Trustee shall serve a term co-extensive with the term of his office entitling him to membership on the Board of Trustees of this Society and his successors in office shall succeed him as a Trustee of this Society. Regular Trustees shall be elected by vote of this Board of Trustees and each Trustee, upon the expiration of his term of office, shall be immediately eligible for re-election. All Trustees shall serve the terms stated above and until their successors are elected and qualify.

Any regular Trustee (but not the ex officio Trustee) may be immediately removed from office by a two-thirds vote of the remaining Trustees taken at any regular meeting or at a special meeting of the Board of Trustees shall promptly be filled by vote of the remaining Trustees.

As many as eight Trustees present at any meeting duly called will constitute a quorum for the transaction of business; provided, however, that a majority of any quorum shall be Trustees who are members in good standing of The North Carolina State Bar and the Bar of the (. . . . .) Judicial District. The Board of Trustees shall hold a meeting at least once in a calendar year.

VII

The officers of the Society shall be: A President, who must be a member in good standing of The North Carolina State Bar, and the Bar of the (. . . . .) Judicial District, a Vice-President, who must also be a member in good standing of The North Carolina State Bar, and the Bar of the (. . . . .) Judicial District, a Secretary, and a Treasurer. The Board of Trustees may also elect one or more Assistant Secretaries and one or more Assistant Treasurers. Any two or more offices may be held by the same person, except the offices of President and Secretary. All officers shall serve terms of one year and until their successors shall be elected and qualify. Each officer shall be immediately eligible for re-election upon the expiration of his term. All officers shall be elected at large by the Board of Trustees, except that the President and Vice-President shall be elected from the membership of the Board. Any officer may be removed by a majority vote of the members present at any meeting of the Board of Trustees called for such purpose at which time a quorum is present. Vacancies occurring in any manner in any of the offices of the Society shall promptly be filled by a vote of the Trustees.

VIII

A committee, composed of the President of the Society, the immediate Past-President of the Society and the ex officio Trustee who is President of the Bar of the (. . . . .) Judicial District, shall be denominated the Professional Services Committee. The President of the district bar, at his election, may apppoint a Trustee who is a member in good standing of the Bar of the (. . . . .) Judicial District to represent the District Bar, in his stead, on the aforesaid committee. In the event the immediate Past-President of the Society is unable or unwilling to serve on the aforesaid committee, the President of the Society shall appoint a Trustee, who is a member in good standing of the Bar of the (. . . . .) Judicial District, to serve in his stead.

The Professional Services Committee shall:

A. Supervise and exercise control over those operations relating to the practice of law and the attorney-client relationship to insure that the same are conducted in accordance with the General Statutes of North Carolina, the Rules and Regulations and the Canons of Ethics of The North Carolina State Bar.

B. Provide adequate procedures for the determination of indigency and to insure that those procedures are complied with.

C. Insure separation of functions of employees so that those employees not members in good standing of The North Carolina State Bar do not perform functions which should be performed by lawyers.

D. Preserve fully the relationship of attorney and client between applicants for legal services and attorneys employed by the Society.

IX

The Society may:

A. Receive funds from the United Fund, the United States of America, the State of North Carolina, or any other source, provided, that the conditions of the donor regarding the use of such funds do not conflict with the provisions of these Articles of Association and shall disburse funds for the conduct of Legal Aid activities within the approved budget of the Society, provided, that, in no event, shall funds be withheld without the approval of the Professional Services Committee, for the purpose of affecting the professional conduct of an attorney employed by the Society.

B. Permit the examination and audit of its records for the information of the donors of its funds, provided, that such audit shall be limited to determining whether the funds have been used in accordance with conditions which have been imposed by the donor, which are consistent with this Article, and which shall involve no control directly or indirectly of the practice of law or the responsibilities of the attorneys employed by the Society.

X

There shall be a Personnel Committee appointed by the President, composed of six members of the Board of Trustees, four of whom shall be members in good standing of the Bar of the (. . . . .) Judicial District. This committee shall have authority to employ and discharge personnel.

XI

Should this Society ever suffer dissolution, voluntarily or otherwise, or fail to call a meeting of its Board of Trustees for more than twenty-four consecutive months, then, in any such event, all of the assets of this Society of every kind and nature shall devolve upon, vest in, and become the absolute property of (. . . . .) to be used by it for the poor and needy of (. . . . .) County, (. . . . .) District of North Carolina.

XII

These Articles of Association may be amended or repealed and new Articles may be adopted by the affirmative vote of two-thirds or more of the entire Board of Trustees at the time in office at any regular meeting of the Board or at any special meeting called for that purpose, provided, that such portion of Article VI as provides that eight members of the Board of Trustees must be duly licensed practicing-attorneys who are members in good standing of The North Carolina State Bar, that such portion of Article VII as provides that the President and Vice-President of the Board of Trustees must be a member in good standing of The North Carolina State Bar, Articles VIII, IX, X, and Article XII shall not be amended.

IN TESTIMONY WHEREOF, the undersigned, being the initial Board of Trustees named above, have hereunto set their hands and seals this the . . . . day of . . . ., 19. . . ..

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APPENDIX E.

RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

Editor's Note. — As to the committee on legal aid to indigents and referrals, see Art. VI, § 5(g) of these rules.

Article I — Purpose:

The Bench and Bar are primarily responsible for making available competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to attorneys representing clients unable to pay for such services and to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education, the following rules are adopted.

Article II — General Definition:

Subject to additional definitions contained in these rules which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in these rules:

A. *Legal Aid Clinic* — An established or proposed department, division, program or course in a law school under the supervision of at least one full time member of the school's faculty or staff who has been admitted and licensed to practice law in this State and conducted regularly and systematically to render legal services to indigent persons.

B. *Indigent Persons* — A person financially unable to employ the legal services of an attorney as determined by a standard of indigence established by a Judge of the General Court of Justice.

C. *Legal Aid* — Legal services of a civil, criminal or other nature rendered for or on behalf of an indigent person without charge to such person.

D. *Third Year Law Student* — A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).

E. *Lawyer* — Supervising lawyer means sole practitioner, one or more lawyers sharing offices but not partners, one or more lawyers practicing together in a partnership or in a professional corporation.

F. *Second Year Law Student* — A student regularly enrolled and in good standing in a law school in this State who has satisfactorily and substantially completed fifty percent (50%) of the requirements for a first professional degree in law (J.D. or its equivalent).

Article III — Eligibility:

In order to engage in activities permitted by these rules, the law student must:

A. Be duly enrolled in this State in a law school approved by the Council of The North Carolina State Bar.

B. A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two thirds of the requirements for a first professional degree in law (J.D. or its equivalent).

C. Be certified by the Dean of his law school, on forms provided by The North Carolina State Bar, as being of good character with requisite legal ability and training to perform as a legal intern. Certification may be denied or, if granted, withdrawn by the Dean without a hearing or any showing of cause and for any reason.

D. Be introduced to the Court in which he is appearing by an attorney admitted to practice in that Court.

E. Neither ask for nor receive any compensation or remuneration of any kind from any client for whom he renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

F. Certify in writing that he has read and is familiar with the Canons of Professional Ethics of North Carolina and the opinions interpretive thereof. (Amended April 15, 1977.)

Editor's Note. — The amendment adopted April 15, 1977, added a proviso to subdivision B, pertaining to participation by qualified second year law students. This provision has expired under its own terms, which provided that the amendment be on a trial basis for one year commencing July 1, 1977.

Article IV — Form and Duration of Certification:

A certification of a student by the Law School Dean:

A. Shall be filed with the Secretary of The North Carolina State Bar in the Office of The North Carolina State Bar in Raleigh and, unless it is sooner withdrawn, it shall remain in effect until the expiration of 18 months after it is filed, or until the announcement of the results of the first Bar Examination following the student's graduation, whichever is earlier. For any student who passes that examination, a certification shall continue in effect until the date he is admitted to the Bar.

B. May be withdrawn by the Dean at any time without a hearing and without any showing of cause and*shall* be withdrawn by him if the student ceases to be duly enrolled as a student prior to his graduation, by mailing a notice to that effect to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh, to the supervising attorney and to the student.

C. May be withdrawn by any Resident Superior Court Judge or Judge holding the Court of the judicial district in which the student is appearing or has appeared at any time without notice or hearing and without any showing of cause. Notice of the withdrawal shall be mailed to the student, to the supervising attorney, to the student's Dean, and to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh.

D. Forms to be used for certification and withdrawal of certification are attached.

Article V — Supervision:

A supervising lawyer shall:

A. Be an active member of the State Bar of North Carolina, and before supervising the activities specified in Rule VI hereof, shall have actively practiced law in North Carolina as a full time occupation for at least two years.

B. Supervise no more than five students concurrently, unless such lawyer is a full time member of a law school's faculty or staff whose primary responsibility is supervising students in a clinical program.

C. Assume personal professional responsibility for any work undertaken by the student while under his supervision.

D. Assist and counsel with the student in the activities mentioned in these rules, and review such activities with such student, all to the extent required for the proper practical training of the student and the protection of the client.

E. Read, approve and personally sign any pleadings or other papers prepared by such student prior to the filing thereof, and read and approve any documents which shall be prepared by such student for execution by any person or persons not a member or members of the State Bar of North Carolina prior to the submission thereof for execution.

F. As to any of the activities specified by Rule VI hereof:

1. Before commencing supervision of any student, file with the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh, a notice in writing, signed by him, stating the name of such student, the period or periods during which he expects to supervise the activities of such student, and that he will adequately supervise such student in accordance with these rules.
2. Notify the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh in writing promptly whenever his supervision of such student shall cease.

Article VI — Activities:

A properly certified student may engage in the activities provided in this section under the supervision of an attorney qualified and acting in accordance with the provision of Section V:

A. Without the presence of the supervising attorney, a student may give advice to a client on legal matters provided that the student gives a clear prior explanation to the client that he is not an attorney and provided that the supervising attorney has given the student permission to render legal advice in the subject area involved.

B. Without being physically accompanied by the supervising attorney, a student may represent indigent persons or the state in the following hearings or proceedings:

1. Administrative hearings and proceedings before Federal, State, and local administrative bodies.
2. Civil litigation before Courts or Magistrates, provided the case is one which could be assigned to a magistrate under North Carolina General Statute Section 7A-210(1) and (2), whether or not assignment is in fact requested or made to a magistrate.
3. In any criminal matter, except those criminal matters in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or rule of Court.

C. Without being physically accompanied by the supervising attorney, a student may represent the State in the prosecution of all misdemeanors with the consent of the District Solicitor.

D. When physically accompanied by the supervising attorney who has read, approved, and personally signed any briefs, pleadings, or other papers prepared by the student for presentment to the Court, a student may represent indigent clients or the state in the following hearings or proceedings, provided however, the approval of the presiding Judge is first secured:

1. All juvenile proceedings.
2. The presentation of a brief and oral argument in any civil or criminal matter in the District or Superior Court.
3. All misdemeanor cases.
4. All post-conviction proceedings.

E. A student may accompany his supervising attorney when the supervising attorney is attorney of record for an indigent client in any civil or criminal action, but may take part in the proceedings only with the consent of the presiding Judge.

F. In all cases under this Rule in which a student makes an appearance in Court or before an administrative agency on behalf of a client, he shall have the written consent in advance of the client and his supervising attorney. The client shall be given a clear explanation, prior to the giving of his consent, that the student is not an attorney. These consents shall be filed with the Court and made a part of the record in the case.

G. In all cases under this rule in which a student is permitted to make an appearance in Court or before an administrative agency on behalf of a client, he may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the Jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

H. Except as herein allowed, the certified student shall not be permitted to participate in any activity in the connection with the practical training of law students unless he is under the direct and physical supervision of the supervising attorney.

Article VII — Use of Student's Name:

A. A student's name may properly:
  1. Be printed or typed on briefs, pleadings, and other similar documents on which the student has worked with or under the direction of the supervising lawyer, provided the student is clearly identified as a student certified under these rules, and provided further that a student shall not sign his name to such briefs, pleadings, or other similar documents.
  2. Be signed to letters written on the supervising attorney's letterhead which relate to the student's supervised work, provided there appears below his signature a clear identification that he is certified under these rules, such as "Certified Law Student under the Supervision of . . . . : . . . ." (Supervising lawyer).

B. A student's name may not appear:
  1. On the letterhead of a Supervising lawyer; or
  2. On a business card bearing the name of a Supervising lawyer; or
  3. On a business card identifying the student as certified under these rules.

Article VIII — Miscellaneous:

A. Nothing contained in these rules shall affect the right of any person who is not admitted to practice law to do anything that he might lawfully do prior to the adoption of these rules.

B. These rules are subject to amendment, modification, revision, supplement, repeal, or other change by appropriate action in the future without notice to any student certified at the time under these rules.

NORTH CAROLINA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

IN RE:
APPLICATION OF ....
....
....
....

CERTIFICATION OF ELIGIBILITY AND GOOD MORAL CHARACTER TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR

TO: THE NORTH CAROLINA STATE BAR:

The undersigned certifies as follows:

1. Name and address of person signing this certificate.
....
2. Name and address of law school and official connection with same. ....
....
3. .... is duly enrolled in the State of North Carolina in a law school approved by the Council of The North Carolina State Bar and is in good standing in said law school and has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).
4. ....is of good character with the requisite legal ability and training to perform as a legal intern pursuant to the Rules and Regulations Governing Practical Training of Law Students.

Seal (of School)

...., Dean
....
Name of School

................., Dean of .... Law School being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements contained therein are true of his own knowledge, except as to those matters stated upon information and belief, and, as to those, he believes them to be true.

Sworn and subscribed to before me
this .... day of ...., 19....
......................Notary Public
My commission expires
Form: Dean's Certificate

NORTH CAROLINA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

IN RE:
APPLICATION OF ....
....
....

WITHDRAWAL OF ELIGIBILITY TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

TO: THE NORTH CAROLINA STATE BAR:

The undersigned, having previously certified to the Council of The North Carolina State Bar as to the eligibility for the above named individual to participate in the Practical Training of Law Students Program promulgated by The North Carolina State Bar, does hereby WITHDRAW said certificate of eligibility and does hereby notify The North Carolina State Bar that .... is no longer eligible to participate in said program.

Seal (of School)

...., Dean
....
Name of School

.............., Dean of .... Law School being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements contained therein are true of his own knowledge, except as to those matters stated upon information and belief, and, as to those, he believes them to be true.

Sworn and subscribed to before me
this the ......day of ...., 19....
......................, Notary Public.
My commission expires
Form: Withdrawal of Dean's Certificate

APPENDIX F.

REGULATIONS FOR PROFESSIONAL CORPORATIONS PRACTICING LAW

Editor's Note. — As to the committee on professional corporations, see Art. VI, § 5(h) of these rules.

I

Authority, Scope and Definitions

1.1. Chapter 55B of the General Statutes of North Carolina, being "The Professional Corporation Act," and particularly Section 55B-12, read in connection with G.S. 55B-2 (4), authorizes the Council of The North Carolina State Bar to adopt regulations for professional corporations practicing law. These regulations are adopted by the Council pursuant to this authority.

1.2. These Regulations only supplement the basic statutory law governing professional corporations (Chapter 55B) and shall be interpreted in harmony with this statute and with other statutes and laws governing corporations generally.

1.3. "Council" means the Council of The North Carolina State Bar.

"Licensee" means any natural person who is duly licensed to practice law in North Carolina.

"Professional corporations" means professional corporations organized for the purpose of practicing law in North Carolina.

"Secretary" means the Secretary of The North Carolina State Bar.

II

Name of Professional Corporation

2.1. The name of every professional corporation shall contain the surname of one or more of its shareholders or of one of more persons who were associated with its immediate corporate, individual or partnership predecessor in the practice of law and shall not contain any other name, word or character (other than punctuation marks and conjunctions) except as required by Section 2.3.

2.2. Upon proper authorization, the surname of any bona fide shareholder may be retained in the corporate name after his death or his retirement or inactivity because of age or disability, even though he may have disposed of his stock.

2.3. The name of a professional corporation shall end with the words "Professional Association" or "P.A.".

2.4. A professional corporation may not use any name other than its corporate name, except as required or permitted by statute or rule of court.

2.5. If a living shareholder in a professional corporation whose surname appears in the corporate name becomes a "disqualified person" as that term is defined in the Professional Corporation Act, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder, and such shareholder shall promptly dispose of his stock in the corporation.

2.6. If a shareholder in a professional corporation whose surname appears in the corporate name becomes a federal judge or a judge of the District Court, Superior Court, or Court of Appeals of North Carolina or a Justice of the

Supreme Court of North Carolina or holds any other office which disqualifies him to practice law, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder and such person shall promptly dispose of his stock in the corporation.

III

Prerequisites for Incorporation

3.1. The incorporators, whether one or more, of a professional corporation shall be attorneys at law duly licensed to practice in North Carolina. Before filing the Articles of Incorporation with the Secretary of State, the incorporators shall file with the Secretary of The North Carolina State Bar the original Articles of Incorporation, an additional executed copy, and a conformed copy, together with a registration fee of fifty dollars ($50.00).

3.2. The original Articles of Incorporation, the executed copy, and the conformed copy shall each be accompanied by a certificate (P. C. Form 1) to The North Carolina State Bar verified by all incorporators, setting forth the names and addresses of each person who is an incorporator and of each person who will be an original licensed officer, director, shareholder or employee, and stating that all such persons are duly licensed to practice law in North Carolina, and representing that the corporation will be conducted in compliance with the Professional Corporation Act and these regulations. The number of shares to be owned by each original shareholder need not be stated.

3.3. The original Articles of Incorporation, the executed copy and the conformed copy shall also be accompanied by a form of certificate (P. C. Form 2) for the Secretary to sign, certifying that each of the incorporators and each of the persons who will be original shareholders is duly licensed to practice law in North Carolina. It shall be the duty of the Secretary to review the Articles of Incorporation for compliance with the laws relating to professional corporations and with these regulations. If the Secretary shall determine that all incorporators and all persons who will be original shareholders are duly licensed to practice law in North Carolina and that the Articles of Incorporation conform with the law relating to professional corporations and with these regulations, he shall execute said certificate (P. C. Form 2) on the original Articles of Incorporation, on the executed copy and on the conformed copy and return the original and the conformed copies to the incorporators for filing with the Secretary of State. The executed copy of the Articles of Incorporation with the certificates (P. C. Forms 1 and 2) shall be retained in the office of The North Carolina State Bar as a permanent record. If the Articles of Incorporation are thereafter in any manner changed before being filed with the Secretary of State, they shall be re-submitted to the Secretary and shall not be filed with the Secretary of State until approved by the Secretary.

IV

Certificate of Registration

4.1. If the Secretary makes the findings necessary to execute the certificate specified in Section 3.3 and finds that no disciplinary action is pending before the Council against any of the licensed incorporators or persons who will be officers, directors, shareholders or employees of such corporation and it appears to him that such corporation will be conducted in compliance with the law and these regulations, he shall issue a Certificate of Registration (P. C. Form 3) for the professional corporation to become effective only when the professional corporation actually becomes a corporation upon filing the Articles of Corporation with the Secretary of State. If the Secretary is unable to make the required findings, he shall refund the registration fee to the incorporators.

4.2. The initial Certificate of Registration shall remain effective until July 1 following the date of registration.

4.3. The Certificate of Registration may be renewed from year to year thereafter for years ending June 30, upon written application (P. C. Form 4) to the Secretary, certifying the names and addresses of all licensed officers, directors, shareholders and employees of the corporation and representing that the corporation has complied with these regulations and the provisions of the Professional Corporation Act and a finding by the Secretary that the facts stated in the certificate and the representations are correct. The application shall be accompanied by a renewal fee of twenty-five dollars ($25.00).

V

Stock and Financial Matters

5.1. All directors and the chief executive officer of a professional corporation shall be attorneys at law duly licensed to practice in North Carolina.

5.2. A professional corporation may acquire and hold its own stock.

5.3. No person other than a licensee shall exercise any authority whatsoever over professional matters.

5.4. The income of a professional corporation attributable to its practice of law during the time that a living shareholder is a "disqualified person" as defined in G.S. 55B-2 (1) or after he becomes an officeholder as specified in Section 2.6 shall not in any manner accrue to the benefit of such shareholder or his shares.

5.5. Subject to the provisions of G.S. 55B-7, a professional corporation may make such agreement with its shareholders or its shareholders may make such agreement between themselves as they may deem just for the acquisition of the shares of a deceased or retiring shareholder who becomes disqualified to own shares under the Professional Corporation Act or under these regulations.

5.6. There shall be prominently displayed on the face of all certificates of stock in a professional corporation a legend that any transfer of these shares is subject to the provisions of the Professional Corporation Act of North Carolina and the regulations of the Council of The North Carolina State Bar issued pursuant thereto.

VI

General and Administrative Provisions

6.1. These regulations shall be administered by the Secretary, subject to review and supervision by the Council. The Council may from time to time appoint such standing or special committees as it may deem proper to deal with any matter affecting the administration of these regulations. It shall be the duty of the Secretary to bring to the attention of the Council or its appropriate committee any violation of the law or of these regulations affecting professional corporations.

6.2. If the Secretary shall decline to execute the certificate required by Section 3.3, or to issue a Certificate of Registration required by Section 4.1, or renew the same when properly requested, or shall refuse to take any other action required of him in writing by a professional corporation, the aggrieved party may in writing request a review of such action by the Council, and the Council shall provide a formal hearing for such aggrieved party through a committee of its members, and such hearing shall be reported upon the request of and at the expense of the aggrieved party.

6.3. All amendments to and restated charters of professional corporations and all merger and consolidation agreements to which a professional corporation is a party and all dissolution proceedings and similar changes in the corporate structure of a professional corporation, duly certified by the Secretary of State, shall be filed with the Secretary within ten (10) days after filing with the Secretary of State.

6.4. A professional corporation shall notify the Secretary in writing within ten (10) days after service of process upon it of any action, civil or criminal, against the professional corporation, alone or as a co-defendant, and at the same time supply the Secretary with a true copy of the complaint or other pleading containing such claim. The professional corporation shall thereafter, upon request, supply the Secretary with copies of all subsequent pleadings, orders, judgments, proceedings on appeal and other information reasonably required to keep the Secretary informed of the progress and result of such litigation.

6.5. Except as otherwise provided in these regulations, all reports or papers required by law or by these regulations to be filed with the Council shall be accompanied by a filing fee of two dollars ($2.00).

6.6. The Secretary is authorized to issue the certificate (P. C. Form 5) required by G.S. 55B-6 when stock is transferred in a professional corporation, and such certificate shall be permanently attached to the stub of the transferee's certificate in the stock book of the professional corporation. The fee for such certificate shall be two dollars ($2.00) for each name included in the certificate. The stock books of the corporation shall be kept at the principal office of the corporation and shall be subject to inspection by the Secretary or his delegate during business hours at the principal office of the corporation.

6.7. The Secretary shall keep a file for each professional corporation which shall contain the executed Articles of Incorporation, all amendments thereto, and other actions affecting its corporate structure required by Section 4.3, and all action taken by the Secretary or by the Council or by any committees of the Council with respect to such professional corporation, all reports made by such corporation to the Council, and the date thereof, and all other documents relating to the affairs of the corporation.

6.8. All fees provided for in these regulations shall be the property of The North Carolina State Bar and shall be deposited by the Secretary to its account, and such account shall be separately stated on all financial reports made by the Secretary to the Council and on all financial reports made by the Council.

6.9. The corporation shall furnish to the Secretary from time to time such information and documents relating to the administration of these regulations as the Secretary or the Council may reasonably request.

P. C. Form 1

VII

FORMS

CERTIFICATE OF INCORPORATORS AND APPLICATION FOR CERTIFICATE OF REGISTRATION

The undersigned, being all of the incorporators of ...., a professional corporation about to be incorporated under the laws of North Carolina for the purpose of practicing law, hereby certify to the Council of The North Carolina State Bar:

1. All persons who are incorporators and all persons who, to the best of our knowledge and belief, will be original officers, directors, shareholders and employees who will practice law for said corporation are duly licensed to

practice law in North Carolina. The names and addresses of all such persons are:

Name	*Address*
....	....
....	....
....	....
....	....
....	....

2. To the best of our knowledge and belief, no disciplinary action is pending or threatened in any jurisdiction against any of the persons listed above.

3. We represent that the corporation will be conducted in compliance with The Professional Corporation Act and with the Regulations of the Council of The North Carolina State Bar.

4. Application is hereby made for a Certificate of Registration to become effective when the Articles of Incorporation are filed with the Secretary of State. Attached hereto is check for $50.00 for the registration fee.

....
Incorporator

....
Incorporator

....
Incorporator

....
Incorporator

....
Incorporator

NORTH CAROLINA
.... COUNTY

I HEREBY CERTIFY THAT ....,
....................................,
....................................,
.... and
....................................,
being incorporators of ....,
personally apeared before me this day and stated that they had read the foregoing Certificate of Incorporators and Application for Certificate of Registration and that the statements contained therein are true.

Witness my hand and notarial seal, this .... day of ...., 19.....

....
Notary Public

My commission expires:
....

This form is designed to furnish the information necessary for the Secretary's certificate (P. C. Form 2) required by G.S. 55B-4 and as an application for the first Certificate of Registration (P. C. Form 3) required by G.S. 55B-10. See Regulations 3.2 and 4.1.

P. C. Form 2

CERTIFICATION BY COUNCIL OF THE NORTH CAROLINA STATE BAR

The incorporators of .... have certified to the Council of The North Carolina State Bar the names and addresses of all persons who will be original owners of its shares.

Based upon that certificate and my examination of the roll of attorneys at law licensed to practice in North Carolina, which roll is maintained in my office, I hereby certify that each person who will be an original owner of shares in said corporation is duly licensed to practice law in North Carolina.

This certificate is executed under the authority of the Council of The North Carolina State Bar, this ....day of ...., 19 .....

....

Secretary of The North Carolina State Bar

This certificate is required by G.S. 55B-4 (4) and must be attached to the original Articles of Incorporation when filed with the Secretary of State. See Regulation 3.3.

P. C. Form 3

CERTIFICATE OF REGISTRATION OF

....

It appears that this corporation has met all of the requirements for a professional corporation organized to practice law in North Carolina.

By authority of the Council of The North Carolina State Bar, I hereby issue this Certificate of Registration pursuant to the provisions of G.S. 55B-10 and the regulations of the Council of The North Carolina State Bar.

This registration expires June 30, 19 .....

....

Secretary of The North Carolina State Bar

P. C. Form 1 is the only application necessary for issuance of the first Certificate of Registration. Application for annual renewal of the Certificate of Registration must be made on P. C. Form 4. See Regulations 4.1 and 4.2.

P. C. Form 4

APPLICATION FOR RENEWAL OF CERTIFICATE OF REGISTRATION

Application is hereby made by the undersigned professional corporation for renewal of its Certificate of Registration. Attached is check for the renewal fee of $25.00.

In support of this application, we certify to the Council of The North Carolina State Bar:

1. All officers, directors, shareholders and employees of the corporation who practice law for the corporation are duly licensed to practice law in North Carolina.

2. The names and addresses of all such persons and their connection with the corporation as officers, directors, shareholders and employees are as follows:

Name and Address	Connection with Corporation (State each connection such as president, director, and shareholder)
....	....
....	....
....	....

3. At all times since the issuance of its last Certificate of Registration, this corporation has complied with the Regulations of the Council of The North Carolina State Bar and with The Professional Corporation Act.

4. No disciplinary action is pending or threatened in any jurisdiction against any of the persons listed in paragraph 2 above.

....
(Name of Corporation)
By ....
President (or Chief Executive)

NORTH CAROLINA
........................COUNTY

I HEREBY CERTIFY that ...., being ....of ...., personally appeared before me this day and stated that he had read the foregoing Application for Renewal of Certificate of Registration and that the statements contained therein are true.

Witness my hand and notarial seal, this .... day of ...., 19.....

....
Notary Public

My commission expires:
....

G.S. 55B-11 requires application for annual renewal of Certificate of Registration. See Regulation 4.3.

P. C. Form 5

CERTIFICATION BY COUNCIL OF THE NORTH CAROLINA STATE BAR FOR TRANSFER OF STOCK

I hereby certify that ....
(Transferee)
is duly licensed to practice law in North Carolina; and as of this date may be a transferee of stock in a professional corporation formed to practice law in North Carolina.

This certificate is executed under the authority of the Council of The North Carolina State Bar, this ....day of ...., 19....

....
Secretary of The North Carolina State Bar

This certificate is required by G.S. 55B-6. It must be permanently attached to the stub of the transferee's certificate of stock. See Regulation 6.6.

APPENDIX G.

PLAN FOR DISPOSITION OF FUNDS RECEIVED FROM INTEREST ON TRUST ACCOUNTS

Editor's Note. — As to the committee for the disposition of funds received from interest on trust accounts, see Art. VI, § 5(j) of these rules.

The plan is:

I. Any funds remitted to the North Carolina State Bar from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to DR 9-102(C) shall be deposited by the North Carolina State Bar in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

II. The funds received, and any interest, dividends, or other proceeds received thereafter with respect to these funds shall be used for programs concerned with improvement of the administration of justice, under the supervision and direction of the Board of Trustees established under this plan to administer the funds.

III. The programs for which the funds may be utilized shall consist of: (a) providing legal services to indigents; (b) establishment and maintenance of lawyer referral systems in order to assure that persons in need of legal services can obtain such services from a qualified attorney; (c) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys; (d) development of a client security fund to protect the public from loss due to dishonest or fraudulent practices on the part of lawyers; (e) development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education when otherwise they would not have adequate funds for this purpose; and (f) such other programs designed to improve the administration of justice as may from time to time be proposed by the Board of Trustees and approved by the Supreme Court of North Carolina.

IV. The Board of Trustees shall consist of nine members appointed by the Council of the North Carolina State Bar. Effective September 1, 1985, three shall be appointed for a term of three years, three shall be for a term of two years, and three shall be for a term of one year. Thereafter, all appointments shall be for a term of three years beginning September 1. No member shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three-year term. The Council of the North Carolina State Bar shall designate the Chairman and Vice-Chairman from time to time and shall fill any vacancy which occurs before the expiration of a term for the balance of the term so remaining. (Amended July 26, 1985.)

V. The Board of Trustees may grant, lend, or invest the funds received by the State Bar pursuant to DR 9-102(C) and funds may be employed to pay such administrative expenses as may be reasonably incurred in connection with the activities of the Board of Trustees. Grants or loans may be made by the Board of Trustees to such persons or entities as the Board of Trustees may consider appropriate in connection with implementing the programs being supported.

VI. If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

APPENDIX H.

PLAN OF CERTIFIED LEGAL SPECIALIZATION

Editor's Note. — As to the board of legal specialization, see Art. VI, § 5(k) of these rules.

1. Purpose

The purpose of this plan of certified legal specialization is to assist in the delivery of legal services to the public by identifying to the public those lawyers who have demonstrated special knowledge, skill, and proficiency in a specific field, allowing the public to more closely match their needs with available services; and to improve the competency of the bar by establishing an additional incentive for lawyers to participate in continuing legal education and meet the other requirements of specialization.

2. Establishment of Board of Legal Specialization

The Council of the North Carolina State Bar with the approval of the Supreme Court hereby establishes a Board of Legal Specialization ("Board"), which Board shall be the authority having jurisdiction under state law over the subject of specialization of lawyers. The Board shall be composed of nine members appointed by the Council of the North Carolina State Bar, three of whom shall be non-lawyers and the remainder shall be lawyers currently licensed and in good standing to practice law in North Carolina. The lawyer members of the Board shall be representative of the legal profession and shall include lawyers who are in general practice as well as those who specialize. One of the lawyer members shall be designated annually by the Council of the North Carolina State Bar as chairperson of the Board. The members shall be appointed by the Council of the North Carolina State Bar to staggered terms of office and the initial appointees shall serve as follows: three (two lawyers and one non-lawyer) shall serve for one year after appointment; three (two lawyers and one non-lawyer) shall serve for two years after appointment and three (two lawyers and one non-lawyer) shall serve for three years after appointment. Appointment to a vacancy among the members shall be made by the Council of the North Carolina State Bar for the remaining term of that member leaving the Board. Any member shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term.

Meetings of the Board shall be held at regular intervals at such times and places and upon such notice as the Board may from time to time prescribe.

3. Powers and Duties of the Board

Subject to the general jurisdiction of the Council and the North Carolina Supreme Court, the Board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty:

3.1 To administer the plan;

3.2 Subject to the approval of the Council and the Supreme Court, to designate areas in which certificates of specialty may be granted and define the scope and limits of such specialties and to provide procedures for the achievement of these purposes;

3.3 To appoint, supervise, act on the recommendations of and consult with specialty committees as hereinafter identified;

3.4 To make and publish standards for the certification of specialists, upon the Board's own initiative or upon consideration of recommendations made by the specialty committees, such standards to be designed to produce a uniform level of competence among the various specialties in accordance with the nature of the specialties;

3.5 To certify specialists or deny, suspend or revoke the certification of specialists upon the Board's own initiative, upon recommendations made by the specialty committees or upon request for review of recommendations made by the specialty committees;

3.6 To establish and publish procedures, rules, regulations and bylaws to implement this plan;

3.7 To propose, and request the Council to make amendments to this plan whenever appropriate;

3.8 To cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the Code of Professional Responsibility of this state to the appropriate disciplinary authority;

3.9 To evaluate and approve, or disapprove, any and all continuing legal education courses, or educational alternatives, for the purpose of meeting the continuing legal education requirements established by the Board for the certification of specialists and in connection therewith to determine the specialties for which credit shall be given and the number of hours of credit to be given in cooperation with the providers of continuing legal education; to determine whether and what credit is to be allowed for educational alternatives, including other methods of legal education, teaching, writing and the like; to issue rules and regulations for obtaining approval of continuing legal education courses and educational alternatives; to publish or cooperate with others in publishing current lists of approved continuing legal education courses and educational alternatives; and to encourage and assist law schools, organizations providing continuing legal education, local bar associations and other groups engaged in continuing legal education to offer and maintain programs of continuing legal education designed to develop, enhance and maintain the skill and competence of legal specialists; and

3.10 To cooperate with other organizations, boards and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization.

Editor's Note. — At its conference on December 2, 1985, the Supreme Court approved creation of the following designated areas in which certificates of specialty may be granted:

1. Bankruptcy Law.
2. Estate Planning and Probate Law.
3. Real Property Law.
   (a) Real property — residential.
   (b) Real property — business, commercial and industrial.

4. Retained Jurisdiction of the Council

The Council retains jurisdiction with respect to the following matters:

4.1 Upon recommendation of the Board, establishing areas in which certificates of specialty may be granted;

4.2 Amending this plan;

4.3 Hearing appeals taken from actions of the Board;

4.4 Establishing or approving fees to be charged in connection with the plan; and

4.5 Regulating attorney advertisements of specialization under the North Carolina Code of Professional Responsibility.

5. Privileges Conferred and Limitations Imposed

The Board in the implementation of this plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers:

5.1 No standard shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to Canon 6 of the North Carolina Code of Professional Responsibility, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist, in a particular field of law;

5.2 No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to Canon 6 of the North Carolina Code of Professional Responsibility, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his availability to practice in any field of law consistent with Canon 2 of the Code of Professional Responsibility, even though he or she is not certified as a specialist in that field;

5.3 All requirements for and all benefits to be derived from certification as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member;

5.4 Paticipation in the program shall be on a completely voluntary basis;

5.5 A lawyer may be certified as a specialist in no more than two fields of law;

5.6 When a client is referred by another lawyer to a lawyer who is a recognized specialist under this plan on a matter within the specialist's field of law, such specialist shall not take advantage of the referral to enlarge the scope of his or her representation and, consonant with any requirements of the Code of Professional Responsibility of this state, such specialist shall not enlarge the scope or representation of a referred client outside the area of the specialty field; and

5.7 Any lawyer certified as a specialist under this plan shall be entitled to advertise that he or she is a "Board Certified Specialist" in his or her specialty to the extent permitted by the Code of Professional Responsibility of this state.

6. Specialty Committees

The Board shall establish a separate specialty committee for each specialty in which specialists are to be certified. Each specialty committee shall be composed of seven members appointed by the Board, one of whom shall be designated annually by the chairperson of the Board as chairperson of the specialty committee. Members of each specialty committee shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the Board, are competent in the fields of law to be covered by the specialty. Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the Board to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the Board to a vacancy shall be for the remaining term of the member leaving the specialty committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term. Meetings of the specialty committee shall be held at regular intervals, at such times, places and upon such notices as the specialty committee may from time to time prescribe or upon direction of the Board.

Each specialty committee shall advise and assist the Board in carrying out the Board's objectives and in the implementation and regulation of this plan in that specialty. Each specialty committee shall advise and make recommendations to the Board as to standards for the specialty and the certification of individual specialists in that specialty. Each specialty committee shall be charged with actively administering the plan in its specialty and with respect to that specialty shall:

6.1 After public hearing on due notice, recommend to the Board reasonable and nondiscriminatory standards applicable to that specialty;

6.2 Make recommendations to the Board for certification, continued certification, denial, suspension or revocation of certification of specialists and for procedures with respect thereto;

6.3 Administer procedures established by the Board for applications for certification and continued certification as a specialist and for denial, suspension or revocation of such certification;

6.4 Administer examinations and other testing procedures, if applicable, investigate references of applicants; and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as specialists;

6.5 Make recommendations to the Board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives, in the specialty; and

6.6 Perform such other duties and make such other recommendations as may be requested of or delegated to the specialty committee by the Board.

7. Minimum Standards for Certification of Specialists

To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the Board for the particular area of specialty:

7.1 The applicant must be licensed and currently in good standing to practice law in this state;

7.2 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate specialty committee, of substantial involvement in the specialty during the five years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the area of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limitd to, successful pursuit of an advanced educational degree, teaching, judicial, government or corporate legal experience;

7.3 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate specialty committee, of continuing legal education in the specialty accredited by the Board for the specialty, the minimum being an average of twelve hours of credit for continuing legal education, or its equivalent, for each of the three years immediately preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the Board, upon advice from the appropriate specialty committee, may prescribe or may be waived if, and to the extent, accreditable continuing legal education courses have not been available during the three years immediately preceding establishment of the specialty; and

7.4 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant, or at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the Board, or appropriate disciplinary body and other persons regarding the applicant's competence and qualifications to be certified as a specialist.

7.5 The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The Board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties.

7.6 All information contained in the application and supporting documents submitted for certification under this section and for recertification under section 8 shall be confidential and shall be available for use only, by either the Board, the appropriate specialty committee, or any appropriate body in event of an appeal, to determine the qualifications of the applicant for certification. Any scores on any examinations required under these rules shall likewise be confidential and used under the same circumstances; however, the score may be released to the applicant. (Amended March 6, 1984.)

8. Minimum Standards for Continued Certification of Specialists

The period of certification as a specialist shall be five years. During such period the Board or appropriate specialty committee may require evidence from the specialist of his or her continued qualification for certification as a specialist and the specialist must consent to inquiry by the Board, or appropriate specialty committee, of lawyers and judges, the appropriate disciplinary body or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application for and approval of continued certification as a specialist shall be required prior to the end of each five-year period. To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the Board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards:

8.1 The specialist must make a satisfactory showing, as determined by the Board after advice from the appropriate specialty committee, of substantial involvement (which shall be determined in accordance with the principles set forth in section 7.2) in the specialty during the entire period of certification as a specialist;

8.2 The specialist must make a satisfactory showing, as determined by the Board after advice from the appropriate specialty committee, of continuing legal education accredited by the Board for the specialty during the period of certification as a specialist, the minimum being an average of twelve hours of credit for continuing legal education, or its equivalent, for each year during the entire period of certification as a specialist; and

8.3 The specialist must comply with the requirements set forth in sections 7.1 and 7.4 above.

9. Establishment of Additional Standards

The Board may establish, on its own initiative or upon the specialty committee's recommendation, additional or more stringent standards for certification that those provided in sections 7 and 8. Additional standards or requirements established under this section need not be the same for initial certification and continued certification as a specialist. It is the intent of the plan that all requirements for certification or recertification in any area of specialty shall be no more nor less stringent than the requirements in any other area of specialty.

10. Suspension or Revocation of Certification as a Specialist

The Board may revoke its certification of a lawyer as a specialist if the specialization program in the specialty is terminated or may suspend or revoke such certification if it is determined, upon the Board's own initiative or upon recommendation of the appropriate specialty committee and after hearing before the Board on appropriate notice, that:

10.1 The certification of the lawyer as a specialist was made contrary to the rules and regulations of the Board;

10.2 The lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the Board or appropriate specialty committee;

10.3 The lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the Board;

10.4 The lawyer certified as a specialist has failed to pay the fees required;

10.5 The lawyer certified as a specialist no longer meets the standards established by the Board for the certification of specialists; or

10.6 The lawyer certified as a specialist has been disciplined, disbarred or suspended from practice by the Supreme Court of any other state or federal court or agency.

The lawyer certified as a specialist has a duty to inform the Board promptly of any fact or circumstance described in sections 10.1 through 10.6, above.

If the Board revokes its certification of a lawyer as a specialist, the lawyer cannot again be certified as a specialist unless he or she so qualifies upon application made as if for initial certification as a specialist, and upon such other conditions as the Board may prescribe. If the Board suspends certification of a lawyer as a specialist, such certification cannot be reinstated except upon the lawyer's application therefor and compliance with such conditions and requirements as the Board may prescribe.

11. Right to Hearing and Appeal to Council

A lawyer who is denied certification or continued certification as a specialist or whose certification is suspended or revoked shall have the right to a hearing before the Board and, thereafter, the right to appeal the ruling made thereon by the Board to the Council under such rules and regulations as the Board and Council may prescribe.

12. Financing the Plan

The financing of the plan shall be derived solely from applicants and participants in the plan. If fees are not established by the Council, the Board shall establish reasonable fees in each specialty field in such amounts as may be necessary to defray the expenses of administering the plan, which fees may be adjusted from time to time. If established or adjusted by the Board, however, the fees must be approved by the Council as provided in section 4.4 above.

APPENDIX I.

RULES OF PROCEDURE CLIENT SECURITY FUND OF NORTH CAROLINA STATE BAR

Editor's Note. — As to the Client Security Fund Board of Trustees, see Art. VI, § 5(l) of these rules.

I. Definitions.

For the purpose of these rules of procedure, the following definitions shall apply:

1. The "Board" shall mean the Client Security Fund Board of Trustees.

2. The "Fund" shall mean the Client Security Fund of the North Carolina State Bar.

3. An "attorney" shall mean one who, at the time of the act complained of, was licensed by the North Carolina State Bar. The fact that the act complained of took place outside the State of North Carolina does not necessarily mean that the attorney was not engaged in the practice of law in North Carolina.

4. "Applicant" shall mean a person who has suffered a reimbursable loss because of the dishonest conduct of an attorney and has filed an application for reimbursement.

5. "Dishonest conduct" shall mean wrongful acts committed by an attorney against an applicant in the manner of embezzlement, the wrongful taking or conversion of monies or other property.

6. "Reimbursable losses":

(a) "Reimbursable losses" are only those losses of money or other property which meet all of the following tests:

(i) The dishonest conduct which occasioned the loss occurred on or after January 1, 1985.

(ii) The loss was caused by the dishonest conduct of an attorney acting either as an attorney or in a fiduciary capacity customary to the private practice of law in the matter in which the loss arose as set out in No. 3 of definitions above.

(iii) That it appears to the Board that the applicant has exhausted all viable means to collect applicant's losses and has complied with these rules.

(b) The following shall be excluded from "reimbursable losses":

(i) Losses of spouses, children, parents, grandparents, siblings, partners, associates and employees of attorney(s) causing the losses.

(ii) Losses covered by any bond, surety agreement, or insurance contract to the extent covered thereby.

(iii) Losses which have been otherwise received from or paid by or on behalf of the attorney who committed the dishonest conduct. (Amended February 27, 1985.)

II. Applications for Reimbursement

1. The Board shall prepare a form of application for reimbursement which shall require the following minimum information:

(a) The name and address of the applicant.

(b) The name and address of the attorney who engaged in the dishonest conduct.

(c) The amount of the alleged loss for which application is made.

(d) The date or period of time during which the alleged loss was incurred.

(e) A general statement of facts relative to the application.

(f) Verification by the applicant.

(g) All supporting documents, including:

(i) Copies of all court proceedings against the attorney.

(ii) Copies of all documents showing any reimbursement or receipt of funds in payment of any portion of the loss.

2. The application shall contain the following statement in boldface type:

> "IN ESTABLISHING THE CLIENT SECURITY FUND PURSUANT TO ORDER OF THE SUPREME COURT OF NORTH CAROLINA, THE NORTH CAROLINA STATE BAR DID NOT CREATE NOR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL ATTORNEYS IN THE PRACTICE OF LAW. ALL REIMBURSEMENTS OF LOSSES FROM THE CLIENT SECURITY FUND SHALL BE A MATTER OF GRACE IN THE SOLE DISCRETION OF THE BOARD ADMINISTERING THE FUND AND NOT A MATTER OF RIGHT. NO APPLICANT OR MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE CLIENT SECURITY FUND AS A THIRD PARTY BENEFICIARY OR OTHERWISE."

3. An application shall be filed in the office of the North Carolina State Bar by being addressed to the central office of the North Carolina State Bar in Raleigh, North Carolina, attention Client Security Fund Board, and shall forthwith be transmitted by such office to the chairman of the Board.

III. Processing Applications

1. The Board shall cause reasonable investigation of any applications filed with the North Carolina State Bar and transmitted to the chairman of the Board.

2. The chairman shall cause each such application to be sent to a member of the Board or other member of the North Carolina State Bar for investigation and report. A copy of the application shall be served upon or sent by registered mail to the last known address of the attorney who it is claimed committed the dishonest act. Wherever possible, the member to whom such application is referred shall practice in the county wherein the alleged defalcating attorney practiced.

3. A member to whom an application is referred for investigation shall conduct such investigation in such manner as he or she deems necessary and desirable in order to determine whether the application is for a reimbursable loss and in order to guide and advise the Board in determining the extent, if any, to which the application should be paid from the fund.

4. A report from the member shall be submitted to the chairman of the Board within a reasonable time. All such reports shall be strictly confidential.

5. The Board will conduct such investigation or review as it deems necessary or desirable in order to determine whether the application is for a reimbursable loss and to guide the Board in determining the extent, if any, to which the applicant should be reimbursed. After considering a report on an application, a Board member may request that testimony be presented concerning the application. In all cases, the alleged defalcating attorney or his personal representative will be given an opportunity to be heard by the Board if he so requests.

6. Of the amounts received by the fund as annual assessments from members of the North Carolina State Bar, up to fifty percent (50%) of such annual amounts shall be available for disbursement for such applications until a corpus of $1,000,000.00 is created. Subject to the foregoing, the Board shall, in its discretion, determine the amount of loss, if any, for which the applicant

should be reimbursed from the fund. In making such determination, the Board shall consider, inter alia, the following:

(a) The negligence, if any, of the applicant which contributed to the loss.

(b) The comparative hardship which the applicant suffered because of the loss.

(c) The total amount of reimbursable losses of applicants on account of any one attorney or association of attorneys.

(d) The total amount of reimbursable losses in previous years for which total reimbursement has not been made and the total assets of the fund.

(e) The total amount of insurance or other source of funds available to compensate the applicant for the loss.

7. The Board may, in its discretion, allow further reimbursement in any year of a reimbursable loss allowed by it in prior years with respect to a loss which has not been fully reimbursed.

8. No reimbursement shall be made to any applicant unless a report has been submitted to the members in accordance with paragraph III, subparagraph 4, of these rules of procedure. No reimbursement shall be made to any applicant unless said reimbursement is approved by a majority vote of the entire Board at a duly held meeting at which a quorum is present.

9. No attorney shall be compensated by the Board for prosecuting an application before it.

10. An applicant may be advised of the status of the Board's consideration of his application and shall be advised of the final determination of the Board. The attorney's name shall not appear in any written communication to an applicant unless and until the Board has directed that a payment be made to the applicant.

11. All applications, proceedings, investigations, and reports involving applications for reimbursement shall be kept confidential until and unless the Board authorizes reimbursement to the applicant or the attorney who is involved requests that the matter be made public. All participants involved in the application, investigation or proceeding (including the applicant) shall conduct themselves so as to maintain the confidentiality of the application, investigation or proceeding. This provision shall not be construed to deny relevant information to disciplinary committees or to anyone else to whom the State Bar Council authorizes release of information.

12. The Board may, in its discretion, afford the applicant a reconsideration of his or her application; otherwise, such rejection is final and no further consideration shall be given by the Board to said application or another application upon the same alleged facts.

IV. Subrogation for Reimbursement Made

In the event reimbursement is made to an applicant, the North Carolina State Bar shall be subrogated in said amount and may bring such action as is deemed advisable against the attorney, his assets or his estate. Such action may be brought either in the name of the applicant, or in the name of the North Carolina State Bar. The applicant shall be required to execute a "subrogation agreement" in this regard. Upon commencement of an action by the North Carolina State Bar pursuant to its subrogation rights, it shall advise the reimbursed applicant at his or her last known address. A reimbursed applicant may then join in such action to press an application for his or her loss in excess of the amount of the above reimbursement. Any amounts recovered from the attorney by the Board in excess of the amount to which the fund is subrogated, less the Board's actual costs of such recovery, shall be paid to or retained by the claimant as the case may be.

Before receiving a payment from the fund, the person who is to receive such payment or his legal representative shall execute and deliver to the Board a written agreement stating that in the event the reimbursed applicant or his or her estate should ever receive any restitution from the attorney or his estate, the reimbursed applicant agrees that the fund shall be repaid up to the amount of the reimbursement from the fund plus expenses.

V. Board Meetings

1. The Board shall meet from time to time upon call of the chairman, provided that the chairman shall call a meeting at any reasonable time at the request of at least two members of the Board.

2. The chairman shall give the members not less than 15 days' written notice of the time and place of each regular meeting and shall give not less than 5 days' written notice of each special meeting. Notice of any meeting may be waived by a member either before or after the meeting.

3. A quorum at any meeting of the Board shall be three members. No action shall be taken by the Board in the absence of a quorum; but at any meeting any matter may be considered by the members present without the taking of any action with respect thereto.

4. Written minutes of each meeting shall be prepared and permanently maintained.

5. The chairman shall be elected by a majority of the Board at its first meeting of each bar year; his term shall extend until the first meeting of the Board in the following bar year and until his successor is elected and qualified. Should a vacancy occur in the office of chairman, such vacancy shall be filled in the manner of the original selection.

6. The fiscal year of the Board shall coincide with the fiscal year of the North Carolina State Bar.

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ORDER ESTABLISHING CLIENT SECURITY FUND

Adopted August 29, 1984.

1. A Client Security Fund is hereby established. Each active member of the North Carolina State Bar as of 1 December 1984 shall pay the sum of $50.00 on or before 1 January 1985 and a like sum on or before 1 January of each year thereafter. The money shall be paid to the North Carolina State Bar and shall be placed by it in the Client Security Fund.

2. The Client Security Fund shall be administered by the North Carolina State Bar under rules and regulations adopted by it. Such rules and regulations, and any amendments thereto, shall not be effective until approved by this court.

3. The North Carolina State Bar shall submit annually a report to this court accounting for all monies collected and expended in the administration of the Client Security Fund.

4. To insure collection of payments due to the Client Security Fund by each attorney, the North Carolina State Bar is hereby empowered to use the same powers and procedures used to collect the dues provided for in Chapter 84 of the General Statutes of North Carolina.

5. Jurisdiction over the actions of the North Carolina State Bar in administering the Client Security Fund shall remain with this court for the entry of future orders when and as necessary to accomplish the purposes of the Client Security Fund.

Cross References. — As to the board of trustees of the client security fund, see Art. VI, § 5(l) of the Rules, Regulations, etc., of the North Carolina State Bar in this volume. As to the rules of procedure of the client security fund, see Appx. I. to the Rules, Regulations, etc., of the North Carolina State Bar in this volume.

RULES GOVERNING ADMISSION TO PRACTICE OF LAW

Effective February 1, 1976.

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NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 21

OCCUPATIONAL LICENSING BOARDS

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.0101 Address

The offices of the Board of Law Examiners of the State of North Carolina are located in the N. C. State Bar Building at 208 Fayetteville Street, Raleigh, N. C. The mailing address is P. O. Box 25427, Raleigh, N. C. 27611. The offices are open from 9:00 A.M. to 5:00 P.M. Monday through Friday, excepting holidays.

History Note: Statutory Authority G.S. 84-24; 150A-60 (see now 150B-60); Eff. February 1, 1976; amended September 4, 1979.

.0102 Purpose

The Board of Law Examiners of the State of North Carolina was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0103 Membership

The Board of Law Examiners of the State of North Carolina consists of eleven members of the North Carolina Bar elected by the Council of the North Carolina State Bar. One member of said board is elected by the board to serve as chairman for such period as the board may determine. The board also employs an executive secretary to enable the board to perform its duties promptly and properly. The executive secretary, in addition to performing the administrative functions of the position, may act as attorney for the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977.

SECTION .0200. GENERAL PROVISIONS

.0201 Compliance Necessary

No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the state.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0202 Definitions

(a) The term "board" as used in this chapter refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the board.

(b) The term "Secretary" as used in this chapter refers to the "Executive Secretary of the Board of Law Examiners of the State of North Carolina."

(c) Every word importing the masculine gender only shall extend and be applied to females as well as to males.

(d) As used in these rules, the word "filing" or "filed" shall mean received in the office of the Board of Law Examiners.

(e) As used in these rules, the word "chapter" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977.

.0203 Applicants

For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0501 of this Chapter. To be classified as a "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0204 List

As soon as possible after each filing deadline for applications, the secretary shall prepare and maintain a list of general applicants for the ensuing examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980.

.0205 Hearings

Every applicant may be required to appear before the board to be examined about any matters pertaining to his or her moral character, educational background or any other matters set out in Section .0500 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0206 Nonpayment Fees

Failure to pay the fees as required by these rules shall result in a denial of the registration or application to take the North Carolina Bar Examination. All checks payable to the board for any fees which are not honored upon presentment shall be returned to the registrant or applicant who shall, within ten (10) days following the receipt thereof, pay to the board in cash, cashier's check, certified check or money order, any fees payable to the board.

History Note: This rule was adopted by the Board of Law Examiners on June 23, 1977, and amended August 23, 1977.

SECTION .0300. REGISTRATION

.0301 Who Must Register

Every person seeking admission to practice law in the State of North Carolina as a general applicant shall register, by filing with the secretary at the offices of the board a properly completed registration form prescribed and supplied by the board. The registration form may be obtained by writing or calling the offices of the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0302 Registration Forms

Each registration form shall be complete in every detail and must be accompanied by such other evidence or documents as may be prescribed by the board. The registration form requires a person to supply information relating to his background, including family, education, employment, whether he has been a party to any disciplinary or legal proceedings, character references and a certification to be completed by the applicant's dean.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0303 Filing Date

Registrations shall be filed with the secretary at the offices of the board on or before the first Tuesday in March of the year immediately preceding the year in which the applicant applies for admission to practice law in the State.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980.

.0304 Fees; Late Registration

Each registration must be accompanied by a fee of $35.00. An additional fee of $50.00 shall be charged all applicants who file a late registration. All said fees shall be payable to the board. No part of a registration fee shall be refunded for any reason whatsoever.

History Note: Statutory Authority G.S. 84-24, 25; Eff. February 1, 1976; amended September 4, 1979.

SECTION .0400. APPLICATIONS OF GENERAL APPLICANTS

.0401 How to Apply

After complying with the registration provisions of Section .0300 of this Chapter, applications for admission to an examination must be made upon forms supplied by the board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or calling the board's offices.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0402 Application Form

(1) The application form requires an applicant to supply information relating to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, character references, along with a requirement that the applicant be familiar with the Code of Professional Responsibility as promulgated by the North Carolina State Bar. In addition, all applicants must submit four certificates of moral character from individuals who know the applicant, a recent photograph, one set of clear fingerprints and a birth certificate. The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(2) An applicant who has aptly filed a complete application with the board within the past twelve (12) month period immediately preceding the filing deadline specified in Rule .0403 of this Chapter may file a Supplemental Application on forms supplied by the board, along with the applicable fees. An applicant who has filed a Supplemental Application as provided by this rule

within the past seven (7) month period immediately preceding the filing deadline specified in Rule .0403 of this Chapter may file a subsequent Supplemental Application on forms supplied by the board, along with the applicable fees. The Supplemental Application will update the information previously submitted to the board by the applicant. Said Supplemental Application must be filed by the deadline set out in Rule .0403 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; May 5, 1981.

.0403 Filing Deadlines

(1) Applications shall be filed and received by the secretary at the offices of the board not later than 5:00 P.M., Eastern Standard Time, on the second Tuesday in January immediately preceding the date of the July written bar examination and not later than 5:00 P.M., Eastern Daylight Savings Time, on the second Tuesday in October immediately preceding the date of the February written bar examination.

(2) Upon payment of a late filing fee of $100 (in addition to all other fees required by these rules), an applicant may file a late application with the board not later than 5:00 P.M., Eastern Standard Time, on the second Tuesday in March immediately preceding the July written bar examination and not later than 5:00 P.M., Eastern Standard Time, on the first Tuesday in November immediately preceding the February written bar examination.

(3) Any applicant who has aptly filed an application to stand the February written bar examination may make application to take the immediately following July bar examination by filing a Supplemental Application with the secretary of the board at the offices of the board not later than 5:00 P.M., Eastern Daylight Savings Time, on the first Tuesday in May immediately preceding the July written bar examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977; February 5, 1979; September 4, 1979; February 25, 1980.

.0404 Fees

Every application by a general applicant who:

(1) Is a resident of the State of North Carolina and who is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $240.00.

(2) Is a resident of the State of North Carolina and who is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $400.00.

(3) Is a nonresident of the State of North Carolina and who is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $240.00 plus such fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a nonresident.

(4) Is a nonresident of the State of North Carolina and who is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $400.00 plus such other fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a nonresident.

(5) Is filing to take the North Carolina Bar Examination using a supplemental application shall be accompanied by a fee of $200.00.

History Note: Statutory Authority G.S. 84-24, 25; Eff. February 1, 1976; amended August 29, 1978; September 4, 1979; February 25, 1980; May 4, 1982; August 28, 1984.

.0405 Refund of Fees

No part of the fee required by Rule .0404 of this Chapter shall be refunded to the applicant unless the applicant shall file with the secretary a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination, in which event not more than one-half of the fee may be refunded to the applicant in the discretion of the board; provided, however, no part of any fee paid for nonresident investigation shall be refunded.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980.

.0406 Bad Check Policy (Deleted)

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976. This rule was deleted by amendment of August 23, 1977.

SECTION .0500. REQUIREMENTS FOR APPLICANTS

.0501 Requirements for General Applicants

As a prerequisite to being licensed by the board to practice law in the State of North Carolina, a general applicant shall:

(1) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter both at the time the license is issued and at the time of standing and passing a written bar examination as prescribed in Section .0900 of this Chapter;
(2) Have registered as a general applicant in accordance with the provisions of Section .0300 of this Chapter;
(3) Possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;
(4) Be of the age of at least eighteen (18) years;
(5) Have filed formal application as a general applicant in accordance with Section .0400 of this Chapter;
(6) Stand and pass a written bar examination as prescribed in Section .0900 of this Chapter;
(7) Have stood and passed the Multistate Professional Responsibility Examination approved by the board within the twenty-four (24) month period next preceding the beginning day of the written bar examination prescribed by Section .0900 of this Chapter which the applicant passes, or shall take and pass the Multistate Professional Responsibility Examination within the twelve (12) month period thereafter. (This subsection shall apply only to applicants who apply to take the July 1984 and subsequent examinations.)

(8) If the general applicant is a licensed attorney then he be in good professional standing in every state or territory of the United States or the District of Columbia in which the applicant has been licensed to practice law and not under pending charges of misconduct.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977; September 4, 1979; February 25, 1980; April 8, 1983; August 28, 1984; July 26, 1985.

.0502 Requirements for Comity Applicants

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, immigrating or who has heretofore immigrated to North Carolina from such jurisdiction, upon written application may, in the discretion of the board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Secretary, upon such forms as may be supplied by the board, a typed application in duplicate which will be considered by the board after at least six (6) months from the date of filing; the application requires:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, references, the nature of the applicant's practice of law, and familiarity with the Code of Professional Responsibility as Promulgated by the North Carolina State Bar;

(b) That the applicant furnish the following documentation:

i. Certificates of moral character from four (4) attorneys;
ii. A recent photograph;
iii. Two (2) sets of clear fingerprints;
iv. A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying;
v. Transcripts from the applicant's undergraduate and graduate schools;
vi. A copy of all applications for admission to the practice of law that he has filed with any state, territory, or the District of Columbia;
vii. A certificate of his admission to the bar of any state, territory, or the District of Columbia;
viii. A certificate from the proper court or body of every state in which the applicant is licensed therein that he is in good standing and not under pending charges of misconduct;

(2) Pay to the board with each written application, a fee of $625.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a nonresident, no part of which may be refunded to the applicant whose application is denied;

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, while so licensed therein, the applicant has been for at least four out of the last six years, immediately preceding the filing of his application with the Secretary, actively and substantially en-

gaged in the practice of law. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as a corporate counsel; or

(d) Judicial service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States, whether or not such service is in the jurisdiction in which applicant is duly licensed; or

Employment in North Carolina, when conducted pursuant to a license granted by another jurisdiction, to meet the requirement of this rule is limited to:

(a) Employment as house counsel by a person, firm, association, or corporation engaged in business in this State which business does not include the selling or furnishing of legal advice or services to others; or

(b) Employment as a full time faculty member of a law school approved by the Council of the North Carolina State Bar; or

(c) Employment as a full time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill; or

(d) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States.

(4) Satisfy the board that the state, or territory of the United States, or the District of Columbia in which the applicant is licensed and from which he seeks comity will admit North Carolina attorneys to the practice of law in such state, or territory of the United States, or the District of Columbia without written examination, other than the Multistate Professional Responsibility Examination;

(5) Be at all times, in good professional standing in every state, or territory of the United States, or the District of Columbia in which the applicant has been licensed to practice law, and not under pending charges of misconduct while the application is pending before the board.

(6) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter.

(7) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(8) Not have taken and failed the written North Carolina Bar Examination within ten (10) years prior to the date of filing the applicant's comity application.

(9) Have stood and passed the Multistate Professional Responsibility Examination approved by the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended January 31, 1977; August 23, 1977; February 23, 1978; August 29, 1978; September 4, 1979; February 25, 1980; May 4, 1982; November 10, 1982; April 8, 1983; August 28, 1984; July 26, 1985.

SECTION .0600. MORAL CHARACTER

.0601 Burden of Proof

Every applicant shall have the burden of proving that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

CASE NOTES

"Good Moral Character" Defined. — Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

What Character Encompasses. — Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Showing Good Moral Character. — An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Each applicant for admission has, pursuant to this rule, the burden of proving his good moral character, and must initially come forward with sufficient evidence to make out a prima facie case. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

Burden on Board to Show Particular Instances of Misconduct. — To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

When an applicant makes a prima facie showing of good moral character and the board, to rebut the showing, relies on specific acts of misconduct the commission of which are denied by the applicant, the board must prove the specific acts by the greater weight of the evidence. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

The board's brief should be directed to whether the specific findings are supported by the evidence and if so whether they along with other findings of misconduct are sufficient to rebut the applicant's prima facie case. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Proof to Be by Preponderance of Evidence. — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where Essential Facts Are Indisputably Established. — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Board to Make Specific Findings of Fact. — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

The board cannot meet its burden of proving specific acts of misconduct without setting out with specificity what they are and that they have been proved by the greater weight of the evidence. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Scope of Judicial Review. — The "whole record" test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Constitutional Challenge Held Moot. — Action seeking injunctive relief and declaration that bar rules regarding moral character were unconstitutional held moot following plaintiffs' admission to bar. See Nestler v. Board of Law Exmrs., 611 F.2d 1380 (4th Cir. 1980).

.0602 Information

All information furnished to the board by an applicant shall be deemed material, and all such information shall be and become a permanent record of the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0603 Failure to Disclose

No one shall be licensed to practice law in this state by examination or comity:

(1) who fails to disclose fully to the board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to his professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or

(2) who fails to disclose fully to the board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0604 Bar Candidate Committee

Every applicant shall appear before a bar candidate committee appointed by the chairman of the board, in the judicial district in which he resides, or in such other judicial district as the board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. An applicant who has appeared before a bar candidate committee may, in the board's discretion, be excused from making a subsequent appearance before the bar candidate committee. The applicant shall give such information as may be required on such forms provided by the board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised of the time and place of his appearance before the bar candidate committee.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980.

.0605 Denial; Re-application

No new application or petition for reconsideration of a previous application from an applicant who has been denied permission to take the bar examination by the board on the grounds of failure to prove good moral character shall be considered by the board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

SECTION .0700. EDUCATIONAL REQUIREMENTS

.0701 General Education

Each applicant to take the examination must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1977.

.0702 Legal Education

Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law, shall prove to the satisfaction of the board that said applicant has graduated from a law school approved by the Council of the North Carolina State Bar or that said applicant will graduate within thirty (30) days after the date of the written bar examination from a law school approved by the Council of the North Carolina State Bar. Every applicant shall file with the secretary a certificate of the dean, or other proper official of said law school, certifying the date of graduation. A list of the approved law schools is available in the office of the executive secretary.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended September 4, 1979; February 25, 1980.

SECTION .0800. PROTEST

.0801 Nature of Protest

Any person may protest the application of any applicant to be admitted to the practice of law either by examination or by comity.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0802 Format

A protest shall be made in writing, signed by the person making the protest and bearing his home and business address, and shall be filed with the secretary prior to the date on which the applicant is to be examined.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0803 Notification; Right to Withdraw

The secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0804 Hearing

In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the board at a time and place to be designated by the board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination; however, if the applicant passes the written examination, no license to practice law shall be issued to him as provided by Rule .1302 of this chapter until final disposition of the protest in favor of the applicant.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0805 Refusal to License

Nothing herein contained shall prevent the board on its own motion from refusing to issue a license to practice law until the board has been fully satisfied as to the moral fitness of the applicant as provided by Section .0600 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended September 4, 1979.

SECTION .0900. EXAMINATIONS

.0901 Written Examination

Two written bar examinations shall be held each year following 1980 for those applying to be admitted to the practice of law in North Carolina as general applicants.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980.

.0902 Dates

The written bar examinations shall be held in the City of Raleigh beginning in the months of February and July on such dates as the board may set from year to year.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980.

.0903 Subject Matter

The examination may deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended September 4, 1979; July 26, 1985.

Cross References. — As to when changes in the educational requirements of the examination become effective, see § 84-24.

.0904 Passing Score

The board shall determine what shall constitute the passing of an examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .1000. REVIEW OF WRITTEN BAR EXAMINATION

.1001 Review

An unsuccessful applicant to the bar examination may examine the test booklets containing his essay examination along with the model answers and the essay examination in the board's offices.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

.1002 Fees

The board will furnish an unsuccessful applicant a copy of his essay examination at a cost to be determined by the secretary not to exceed $20.00. No copies of the board's model answers will be made or furnished to any applicant.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1003 Multistate Bar Examination

There is no provision for review of the Multistate Bar Examination.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

.1004 Scores

(1) Upon written request the board will release to an unsuccessful applicant his total score on the immediately preceding bar examination and his score on the immediately preceding Multistate Bar Examination.

(2) Upon written request of an applicant, the board will furnish the Multistate Bar Examination score of said applicant to another board of bar examiners, or like organization that administers the admission of attorneys into that jurisdiction.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended February 25, 1980; August 24, 1981.

.1005 Board Representative

The secretary of the board serves as the representative of the board during this review of the written bar examination by an unsuccessful applicant. The secretary is not authorized to discuss any specific questions and answers on the bar examination.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

SECTION .1100. RULEMAKING PROCEDURES

[Repealed]

History Note: This section was repealed by amendment of August 23, 1977.

SECTION .1200. BOARD HEARINGS

.1201 Nature of Hearings

(a) All general applicants may be required to appear before the board or a panel at a hearing to answer inquiry about any matter under these rules.

(b) Each comity applicant shall appear before the board or panel to satisfy the board that he or she has met all the requirements of Rule .0502.

History Note: Statutory Authority G.S. 150A-11 (see now 150B-11); 150A-23 (see now 150B-23); Eff. February 1, 1976; amended August 23, 1977; September 4, 1979.

CASE NOTES

The purpose of the hearing before the board is to probe matters set forth in the notice of hearing required by Rule .1202. Such an inquiry must of necessity concern acts which occurred prior to the hearing. The board should first determine whether in fact the applicant committed the prior acts of misconduct. If it determines that he did, it must then say whether these acts so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981), aff'd, 308 N.C. 771, 303 S.E.2d 810 (1983).

"Good Moral Character" Defined. — Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

What Character Encompasses. — Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Showing Good Moral Character. — An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden on Board to Show Particular Instances of Misconduct. — To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Proof to Be by Preponderance of Evidence. — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where Essential Facts Are Indisputably Established. — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Board to Make Specific Findings of Fact. — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Scope of Judicial Review. — The "whole record" test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

.1202 Notice of Hearing

The chairman will schedule the hearings before the board or panel and such hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or his attorney within a reasonable time before the date of the hearing.

History Note: Statutory Authority G.S. 150A-23 (see now 150B-23); Eff. February 1, 1976; amended August 23, 1977; September 4, 1979.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

.1203 Who Shall Conduct Hearings

(a) All hearings shall be heard by the board except that the chairman may designate two or more members to serve as a panel to conduct these hearings.

(b) The panel will make a determination as to the applicant's eligibility to stand the written bar examination or to be licensed by comity. The panel may grant the application, deny the application, or refer it to the full board for a de novo hearing. The applicant will be notified in writing of the panel's determination. In the event of an adverse determination by the panel, the applicant may request a hearing de novo before the full board by giving written notice to the secretary at the offices of the board within ten (10) days following receipt of the panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the full board and shall result in the determination of the panel becoming final.

History Note: Statutory Authority G.S. 150A-11; Eff. February 1, 1976; amended November 4, 1976; August 23, 1977; September 4, 1979; February 25, 1980; April 8, 1983.

.1204 Continuances; Motions for

Continuances, adjournments and like dispositions will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuance should be made to the secretary of the board and will be granted or denied by the chairman of the board.

History Note: Statutory Authority G.S. 150A-24 (see now 150B-24); Eff. February 1, 1976; amended August 23, 1977.

.1205 Subpoenas

(a) The board shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(b) The secretary of the board is delegated the power to issue subpoenas in the board's name.

History Note: Statutory Authority G.S. 150A-23 (see now 150B-23); Eff. February 1, 1976; amended August 23, 1977.

.1206 Depositions and Discovery

(a) A deposition may be used in evidence when taken in compliance with the N.C. Rules of Civil Procedure, G.S. 1A-1. The board may also allow the use of depositions or written interrogatories for the purpose of discovery or for the use as evidence in the hearing or for both purposes pursuant to the N.C. Rules of Civil Procedure.

(b) Any party or the board may submit sworn affidavits as evidence to be considered by the board in a board hearing. The board will take under consideration sworn affidavits presented to the board by persons desiring to protest an applicant's admission to the North Carolina Bar.

History Note: Statutory Authority G.S. 150A-11 (see now 150A-11); Eff. February 1, 1976; amended August 23, 1977; September 4, 1979.

.1207 Reopening of a Case

After a final decision has been reached by the board in any matter, a party may petition the board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The decision made by the board will be in writing and a copy will be sent to the petitioner or his attorney and made a part of the record of the hearing.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976; amended August 23, 1979.

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Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

SECTION .1300. LICENSES

.1301 Interim Permit for Comity Applicants

No license shall be issued to any comity applicant for admission under Rule .0502 of this Chapter except at the time of the annual licensing of the general applicants; provided, the board may at any other time, in its discretion, grant an interim permission to such comity applicants to practice law until license shall be issued.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1302 Licenses for General Applicants

Upon compliance with the rules of the board, and all orders of the board, the secretary, upon order of the board, shall issue a license to practice law in North Carolina to each applicant as may be designated by the board in the form and manner as may be prescribed by the board, and at such times as prescribed by the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .1400. JUDICIAL REVIEW

.1401 Appeals

Any person may appeal from an adverse ruling by the Board of Law Examiners. A general applicant may appeal from an adverse ruling or determination by the board as to the applicant's eligibility to take the written examination. After a general applicant has successfully passed the written examination, he may appeal from any adverse ruling or determination withholding his license to practice law. A comity applicant may appeal from an adverse ruling of the Board of Law Examiners denying his application to the North Carolina Bar by comity for failure to meet any of the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1402 Notice

Notice of appeal shall be given, in writing, within twenty (20) days after notice of such ruling or determination and written exceptions to the ruling or determination filed with the secretary, which exceptions shall state the grounds of objection to such ruling or determination. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the board becoming final.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

.1403 Record to Be Filed

Within sixty days after receipt of the notice of appeal, the Secretary shall prepare, certify, and file with the clerk of the Superior Court of Wake County, at the expense of the appellant, the record of the case, comprising:

(1) the application and supporting documents or papers filed by the applicant with the board;
(2) a complete transcript of the testimony when taken at the hearing;
(3) copies of all pertinent documents and other written evidence introduced at the hearing;
(4) a copy of the decision of the board; and
(5) a copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981); In re McCarroll, — N.C. —, 327 S.E.2d 880 (1985).

.1404 Wake County Superior Court

Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken except that in cases of alleged omissions or errors in the record. Testimony thereon may be taken by the court. The findings of fact by the board, when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

CASE NOTES

Applied in In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Cited in In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

.1405 North Carolina Supreme Court

Any party to the review proceeding, including the board, may appeal to the Supreme Court from the decision of the superior court. No appeal bond shall be required of the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

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Applied in In re Moore, 308 N.C. 771, 303 S.E.2d 810 (1983).

Cited in In re Elkins, 308 N.C. 317, 302 S.E.2d 215 (1983).

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RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

PREAMBLE: A LAWYER'S RESPONSIBILITIES
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Editor's Note. — The Code of Professional Responsibility was adopted by the Council of the North Carolina State Bar on Jan. 12, 1973, amended April 13, 1973, and approved by the Supreme Court April 30, 1973, and became effective Jan. 1, 1974. By date of July 26, 1985, the Code of Professional Conduct, which extensively rewrote the Code of Professional Responsibility, was adopted. It was approved by the Supreme Court October 7, 1985.

Preamble: A Lawyer's Responsibilities

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. In the nature of law practice, however, conflicting responsibilities are encountered. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a self-regulated profession.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding the voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 4, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers, or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provides general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Definitions

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm or professional corporation, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Full disclosure" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership or a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

CANON I

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.

CASE NOTES

Editor's Note. — The cases cited below were decided under the Canons, Ethical Considerations and Disciplinary Rules of the Code of Professional Responsibility as it read prior to its rewrite as the Rules of Professional Conduct.

Where it appeared on the face of the notice of charges in a disciplinary proceeding that the judge may have prejudged respondent's conduct before hearing evidence on alleged violations, his order of suspension had to be vacated, and the case retained for rehearing by the Court of Appeals. In re Robinson, 37 N.C. App. 671, 247 S.E.2d 241 (1978); In re Dale, 37 N.C. App. 680, 247 S.E.2d 246 (1978).

Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Assisting or Participating in Perjury. — It is axiomatic that the right of a client to effective counsel in any case (criminal or civil) does not include the right to compel counsel to knowingly assist or participate in the commission or perjury or the creation or presentation of false evidence. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Intentionally encouraging the concealment of material facts relevant to the identity of the driver in a driving under the influence prosecution is prejudicial to the administration of justice. Such conduct raises serious doubts about an attorney's desire to bring about a just result in such a prosecution and adversely reflects upon such attorney's fitness to practice law. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

Knowledge of Failure to Perfect Appeal Not "Knowledge of a Clear Violation". — An allegation that defendant attorney and defendant district court judges knew that plaintiff's attorney had failed to perfect an appeal did not support an inference that defendants had "knowledge of a clear violation of DR 1-102" which defendants should have reported to the state and district bars, since there are many legitimate reasons as to why an appeal may not be perfected. Williams v. Council of N.C. State Bar, 46 N.C. App. 824, 266 S.E.2d 391, cert. denied, 301 N.C. 106, — S.E.2d — (1980).

Informing potential witness to plead the Fifth Amendment or to not appear in court if not subpoenaed is not unethical. Certainly no rule prevents the attorney from informing a potential witness as to his legal alternatives. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

An attorney clearly engaged in conduct which involved fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of letters which contained the opposing party's return address, while at the same time presenting to the court an affidavit, which she had drafted, in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. North Carolina State Bar v. Wilson, — N.C. App. —, 330 S.E.2d 280 (1985).

An attorney-CPA who is engaged in the practice of law cannot ethically hold himself out as an accountant. Duggins v. North Carolina State Bd. of CPA Exmrs., 25 N.C. App. 131, 212 S.E.2d 657, aff'd, 294 N.C. 120, 240 S.E.2d 406 (1975).

Effect of Plea of Nolo Contendere on Subsequent Disciplinary Proceedings. — Defendant's plea of nolo contendere in the federal district court to a charge of receiving and possessing chattels valued at less than $100.00 knowing them to have been stolen or embezzled did not entitle the State Bar to summary judgment authorizing disciplinary action against the defendant. North Carolina State Bar v. Hall, 293 N.C. 539, 238 S.E.2d 521 (1977).

Rule 1.1 Bar Admission and Disciplinary Matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(A) Knowingly make a false statement of material fact; or

(B) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 4.

COMMENT

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. It should also be noted that G.S. 84-28(b)(3) defines failure to answer a formal inquiry of the North Carolina State Bar as misconduct for which discipline is appropriate.

This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of the North Carolina Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

Rule 1.2 Misconduct.

It is professional misconduct for a lawyer to:

(A) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(B) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(C) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(D) Engage in conduct that is prejudicial to the administration of justice;

(E) State or imply an ability to influence improperly a government agency or official; or

(F) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation and professional unfitness.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Rule 1.3 Reporting Professional Misconduct.

(A) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or other appropriate authority.

(B) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(C) This Rule does not require disclosure of information otherwise protected by Rule 4.

COMMENT

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a substantial violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 4. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interest.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed before but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the alleged offense and not the quantum of evidence of which the lawyer is aware. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

CANON II

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.

Legal Periodicals. — For note on covenants not to compete between attorneys, see 50 N.C.L. Rev. 936 (1972).

For article, "The Advent of Prepaid Legal Services in North Carolina," see 13 Wake Forest L. Rev. 271 (1977).

For article, "The Right to Zealous Counsel," see 6 Duke L.J. 1291 (1979).

For note on an attorney's right to compensation when discharged without cause from a contingent fee contract, see 15 Wake Forest L. Rev. 677 (1979).

For comment on contingent fees in domestic relations actions, see 62 N.C.L. Rev. 381 (1984).

CASE NOTES

Editor's Note. — The case cited below was decided under the Canons, Ethical Considerations and Disciplinary Rules of the Code of Professional Responsibility as it read prior to its rewrite as the Rules of Professional Conduct.

Reasonable counsel fees may be determined in part by the amount of the verdict obtained in condemnation proceeding in light of proposals made to the property owner prior to his employment of an attorney. The results obtained by an attorney are a legitimate consideration in determining the amount of his fee. Redevelopment Comm'n v. Hyder, 20 N.C. App. 241, 201 S.E.2d 236 (1973).

Rule 2.1 Communications Concerning a Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(A) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(B) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(C) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

COMMENT

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 2.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (B) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of clients, such as the amounts of damage awards or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to specific factual and legal circumstances.

Rule 2.2 Advertising.

(A) Subject to the requirements of Rule 2.1, a lawyer may advertise services through public media, such as telephone directories, legal directories, newspapers or other periodicals, outdoor advertising, radio or television, or through written communications not involving solicitation as defined in Rule 2.4.

(B) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(C) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization. A lawyer may participate in and share the cost of a private lawyer referral service so long as the following conditions are met:

1. Only compensation for administrative service may be paid to a lawyer or layman incident to the operation of the private referral service, which compensation shall be reasonable in amount;
2. All advertisements shall be paid for by the participants in the service;
3. No profit in specie or kind may be received other than from legal fees earned from representation of referred clients;
4. Employees of the referral service may not initiate contact with prospective clients; and
5. All advertisements shall:
    - (a) State clearly and conspicuously that the referral service is privately operated, which statement shall be given the same prominence as the name of the referral service:
    - (b) State that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state further where such information may be obtained; and
    - (c) Indicate that the service is not operated or endorsed by any public agency or any disinterested organization.

Any lawyer participating in a private lawyer referral service shall be professionally responsible for its operation.

(D) Any communication made pursuant to this rule other than that of a lawyer referral service as described above in subsection (C) above shall include the name of at least one lawyer or law firm responsible for its content.

COMMENT

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services in combination with the lawyer's own rights under the First Amendment ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading, overreaching, deceptive, coercive, intimidating, or vexatious.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

This Rule does not prohibit communications authorized by law, such as notices to members of a class in class action litigation.

Rule 2.3 Firm Names and Letterheads.

(A) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rules 2.1 or 2.2. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise false or misleading. Every trade name used by a law firm shall be registered with the North Carolina State Bar, and upon a determinaton by the Council that such name is potentially misleading, a remedial disclaimer or an appropriate identification of the firm's composition or connection may be required. For purposes of this section, the use of the names of deceased former members of a firm shall not render the firm name a trade name.

(B) A law firm practicing in more than one jurisdiction may use the same name in each jurisdiction, but identification of its members and associates in any communication shall indicate the jurisdictional limitations of those not licensed to practice in North Carolina.

(C) A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as an attorney affiliated with the firm.

(D) The name of a lawyer holding a public office shall not be used in the name of the law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm, whether or not the lawyer is precluded from practicing by law.

(E) A lawyer shall not hold himself out as practicing in a law firm unless the association is in fact a firm.

(F) No lawyer may maintain a permanent professional relationship with any lawyer not licensed to practice law in North Carolina unless law offices are maintained in North Carolina and in a state where such other lawyer is licensed and practices and a certificate of registration authorizing said professional relationship is first obtained from the Secretary of the North Carolina State Bar.

COMMENT

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Use of trade names in law practice is acceptable so long as they are not misleading and are otherwise in conformance with the rules and regulations of the State Bar.

As it is unlawful for a person trained as an attorney to practice law in North Carolina without a license from the State, it is misleading and improper for such a person to be listed in any firm communication, public or private, as having any continuing affiliation with the firm as a lawyer, unless he actively practices and maintains offices in another jurisdiction where he is licensed.

Nothing in these rules shall be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

With regard to paragraph (E), lawyers sharing office facilities who are not in fact partners may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

Rule 2.4 Solicitation.

(A) A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship in-person or by telephone when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(B) A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship by mail, telegram or by other written communication when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. This prohibition does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services in a particular matter of the kind provided by the lawyer, but who are so situated that they might in general find such services useful.

COMMENT

There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and over-reaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising permitted under Rule 2.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising to transmit information from lawyer to prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. This informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 2.1. Direct, private communications from a lawyer to a prospective client are not subject to such scrutiny and consequently are much more likely to approach or cross the dividing line between accurate representations and those that are false and misleading.

As the United States Supreme Court has recognized in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, the State has a legitimate and compelling interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching and vexation. These dangers attend direct solicitation whether in-person or by mail. Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition.

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

Similarly, this Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which he or his firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purposes as advertising permitted under Rule 2.2.

Rule 2.5 Specialization.

A lawyer may not represent himself as a specialist in a communication unless he is certified as a specialist by the North Carolina State Bar or unless the communication includes the following disclaimer or language which is substantively similar:

"REPRESENTATIONS OF SPECIALTY DO NOT INDICATE STATE CERTIFICATION OF EXPERTISE."

COMMENT

The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to recognition by the State. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. In order to avoid any confusion, the Rule requires that any representation of specialty be not only true, but be accompanied by a disclaimer of state certification if such is not the case. A lawyer may, however, describe his practice without using the term "specialize" in any manner which is truthful and not misleading and forego use of a disclaimer. He may, for instance, indicate a "concentration" or an "interest" or a "limitation" without disclaimer.

Rule 2.6 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case or for representing a party in a civil case in which such a fee is prohibited by law or otherwise.

(D) A division of fee between lawyers who are not in the same firm may be made only if:

(1) The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) The client is advised of and does not object to the participation of all the lawyers involved; and

(3) The total fee is reasonable.

COMMENT

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding and is desirable.

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 2.8(A)(3). This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, provided this does not involve acquisition of a propriety interest in the cause of action or subject matter of the litigation contrary to Rule 5.3(A). However a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

Once a fee contract has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent his client's best interests regardless of whether he has struck an unfavorable bargain. An attorney may seek to renegotiate his fee agreement in light of changed circumstances or for other good cause, but he may not abandon or threaten to abandon his client to cut his losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement. If a dispute later arising concerning the fee, the burden of proving reasonableness and fairness will be upon the lawyer. All fees, including contingent fees, should be reasonable and not excessive as to percentage or amount.

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Paragraph (D) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

Rule 2.7 Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of the relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

COMMENT

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.

Rule 2.8 Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid forseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Rule of Professional Conduct.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive Withdrawal.

If Rule 2.8(B) is not applicable, a lawyer may request permission to withdraw in matters pending before a tribunal, and may withdraw in other matters, only if:

(1) His Client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal, repugnant or imprudent or that is prohibited under the Rules of Professional Conduct.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Rules of Professional Conduct.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(g) Has used the lawyer's services to perpetrate a crime or fraud.

(2) His continued employment is likely to result in a violation of a Rule of Professional Conduct.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

COMMENT

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client.

A lawyer may withdraw from representation in some circumstances. Withdrawal is justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

The lawyer may never retain papers to secure a fee. Generally, anything in the file which would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and cancelled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

A lawyer who has represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the State for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

CANON III

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law.

Rule 3.1 Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a person not licensed to practice law in North Carolina in the unauthorized practice of law.

(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(C) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(D) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

COMMENT

The definition of the practice of law is established by G.S. 84-2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (A) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer retains responsibility for the delegated work. See Rule 3.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commerical institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended attorney in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed attorney in the firm must take full responsibility for and employ independent judgment in adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended attorney should have no communications or dealings with or on behalf of clients represented by such disbarred or suspended attorneys or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing attorney or law firm should perform no services for clients represented by the disbarred or suspended attorney during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney is not acting as an attorney, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

An attorney or law firm should not employ a disbarred or suspended attorney who was associated with such attorney or firm at any tme on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the attorney. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself to activities not involving the actual practice of law if he were employed in his former office setting and obliged to deal with the same staff and clientele.

Rule 3.2 Dividing Legal Fees with a Non-Lawyer.

A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(A) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.

(B) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer or disbarred lawyer may pay to the estate of the deceased lawyer or to the disbarred lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer or disbarred lawyer.

(C) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

COMMENT

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment.

Rule 3.3 Responsibilities Regarding Nonlawyer Assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(A) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(B) A lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(C) A lawyer shall be responsible for conduct of such a nonlawyer that would violate the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

CANON IV

A Lawyer Should Preserve the Confidences of His Client.

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Editor's Note. — The cases cited below were decided under the Canons, Ethical Considerations and Disciplinary Rules of the Code of Professional Responsibility as it read prior to its rewrite as the Rules of Professional Conduct.

Section 15A-977 does not violate this Canon; it does not require an attorney to reveal information told to him in confidence by his client. Where the defendant consents to disclosure, this Canon is not violated. State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

Disqualification. — Under this Canon and Canon 9, if an attorney has formerly represented an adverse party in matters substantially related to the subject of the action, the attorney should be disqualified, nothing else appearing. It is not necessary to show that the attorney received confidential information. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, cert. granted, 308 N.C. 386, 302 S.E.2d 251, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

Discretion of Court as to Disqualification. — It is within the discretion of the trial court whether or not an attorney for his former representation of an opposing party. This discretion must be exercised within the parameters of this Canon and Canon 9. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, cert. granted, 308 N.C. 386, 302 S.E.2d 251, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

Factors Considered in Disqualifying Attorney. — In exercising its discretion in determining whether to disqualify an attorney, the trial court may consider the right of a party to have counsel of his or her choice and the effect a disqualification would have on the expeditious disposal of the case. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, cert. granted, 308 N.C. 386, 302 S.E.2d 251, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

Waiver of Right to Have Attorney Disqualified. — A party can waive his right to have his former attorney disqualified. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, cert. granted, 308 N.C. 386, 302 S.E.2d 251, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

An attorney should not use against a former client information he has received while representing that client although the information is not confidential and is available to others. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, cert. granted, 308 N.C. 386, 302 S.E.2d 251, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

Dual Representation Proper. — A law firm which represented an insurance company in securing information to bring the insurance company back into compliance with North Carolina law and in rehabilitation proceedings was not prohibited from representing plaintiff minority shareholders of the company in a derivative action against the company's directors. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 183 (1979).

Rule 4 Preservation of Confidential Information.

(A) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients.

(B) Except when permitted under Rule 4(C), a lawyer shall not knowingly:
  (1) Reveal confidential information of his client.
  (2) Use confidential information of his client to the disadvantage of the client.
  (3) Use confidential information of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:
  (1) Confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation.
  (2) Confidential information with the consent of the client or clients affected, but only after full disclosure to them.
  (3) Confidential information when permitted under the Rules of Professional Conduct or required by law or court order.
  (4) Confidential information concerning the intention of his client to commit a crime, and the information necessary to prevent the crime.
  (5) Confidential information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

COMMENT

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they may avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to a specified lawyer or lawyers.

The confidentiality rule is subject to limited exceptions. For instance, in becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime and may reveal that information to prevent the crime. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. Similarly, a lawyer has a duty not to use false evidence. This duty is essentially a special instance of the duty to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 7.2(A)(8), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (C)(4), the lawyer has professional discretion to reveal information in order to prevent the crime. It is, of course, sometimes difficult for a lawyer to "know" when such a purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (C)(4) does not violate this Rule.

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 4. This Rule does not prevent the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (C)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (C)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 4(B) requires the lawyer to invoke the attorney-client privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. A lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 4 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

The duty of confidentiality continues after the client-lawyer relationship has terminated.

CANON V

A Lawyer Should Exercise Independent Professional Judgment on Behalf of His Client.

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

Editor's Note. — The cases cited below were decided under the Canons, Ethical Considerations and Disciplinary Rules of the Code of Professional Responsibility as it read prior to its rewrite as the Rules of Professional Conduct.

Canon 5 is addressed solely to the relationship between the attorney and his immediate clients. Aetna Cas. & Sur. Co. v. United States, 570 F.2d 1197 (4th Cir.), cert. denied, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).

No Improper Acquisition of Interest in Subject Matter of Litigation. — A fee arrangement whereby a law firm would receive a one-third interest in the shares it was representing in a derivative action by minority shareholders of a corporation against directors of the corporation did not constitute an acquisition by the law firm of an improper interest in the subject matter of the litigation. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 183 (1979).

Representation of Multiple Clients Resulting in Conflict of Interest. — In a suit against the United States to recover losses resulting from an airplane crash, representation by the Department of Justice of both the United States and individual air traffic controllers would create a conflict of interest and would prevent adequate representation of the individual controllers. Aetna Cas. & Sur. Co. v. United States, 438 F. Supp. 886 (W.D.N.C. 1977).

Attorney who was retained by decedent's administratrix owed a duty to decedent's natural daughter to use reasonable care in representing the estate, and daughter's allegation that he violated that duty by failing to list possible wrongful death action against decedent's husband as an asset of decedent's estate, by continuing to represent the estate after administratrix also became the representative of decedent's husband when he committed suicide, and by colluding with other defendants, stated a cause of action in tort for attorney malpractice. Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354, cert. denied, 311 N.C. 758, 321 S.E.2d 136 (1984).

A prosecuting attorney for another state should not be permitted to represent a criminal defendant in this State, in order to avoid even the appearance of professional impropriety and to insure the exercise by the attorney for the defendant of independent professional judgment on his behalf. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

Conflict of Interest as Denial of Effective Assistance of Counsel. — The existence of an actual conflict of interest between two codefendants, tried in a joint trial and represented by two members of the same law firm or by single counsel, constitutes a denial of effective assistance of counsel when actual prejudice is shown. State v. Arsenault, 46 N.C. App. 7, 264 S.E.2d 592 (1980).

Informed Consent of Client as to Potential Conflict of Interest. — The consent of an individual litigant to representation by counsel with a potential conflict of interest by his representation of another party cannot be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest. Aetna Cas. & Sur. Co. v. United States, 438 F. Supp. 886 (W.D.N.C. 1977).

Testifying on Behalf of Clients. — The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as witness for his client has surrendered his right to participate in the litigation. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

The weight of authority in this country is that while it is a breach of professional ethics for an attorney for a party to testify as to matters other than formal matters without withdrawing from the litigation, he is not incompetent so to testify. The testimony is admissible if otherwise competent. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

There is no compelling reason to extend existing law by holding that the evidence presented by an attorney who testifies while representing a client before a local administrative board may not be considered by such local administrative board. However, attorneys are strongly discouraged from serving as both a witness and an advocate, even if before local administrative boards, unless compelling circumstances exist. Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520, cert. denied, 299 N.C. 737, 267 S.E.2d 663 (1980).

As to the propriety of testimony of an attorney in a prosecution for the issuance of checks with knowledge of insufficient funds to pay the checks upon presentation, where the attorney represented individual to whom defendant's checks were returned for insufficient funds, and had no official responsibility in the conduct of the trial of defendant on criminal charges, his only connection with the case being his attempt to procure payment for his client of the obligations owed to the client by the defendant after defendant's checks were returned. See State v. Passmore, 37 N.C. App. 5, 245 S.E.2d 107, cert. denied, 295 N.C. 556, 248 S.E.2d 734 (1978).

Whether counsel can withdraw as counsel is a matter in the sound discretion of the trial judge. State v. Elam, 56 N.C. App. 590, 289 S.E.2d 857, cert. denied, 305 N.C. 761, 292 S.E.2d 577 (1982).

Rule 5.1 Conflicts of Interest: General Rule.

(A) A lawyer shall not represent a client if the representation of that client will be or is likely to be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the interest of the other client; and

(2) Each client consents after full disclosure which shall include explanation of the implications of the common representation and the advantages and risks involved.

(B) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after full disclosure which shall include explanation of the implications of the common representation and the advantages and risks involved.

(C) A lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests, and shall withdraw from representation of any party he cannot adequately represent or represent without using confidential information or secrets of another client or former client except as Rule 4 would permit with respect to a client.

(D) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after full disclosure.

COMMENT

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 2.8.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (A) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (A) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (B) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (A)(1) with respect to representation directly adverse to a client, and paragraph (B)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

The lawyer's own interest should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Paragraph (A) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or codefendants, is governed by paragraph (B). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (B) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Rule 5.2 The Lawyer as Witness.

(A) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify under the circumstances enumerated in (A) above.

(C) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

COMMENT

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (A)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (A)(3) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (A)(4) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

Rule 5.3 Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in civil cases, except as prohibited by Rule 2.6.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

COMMENT

A lawyer's acquisition of a proprietary interest in his client's cause of action or any res involved therein might cloud his judgment and impair his ability to function as an advocate.

Rule 5.4 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client unless the client has consented after full disclosure. A lawyer shall not enter into a business transaction with a client under any circumstances unless it is fair to the client.

(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

(C) During or subsequent to legal representation of a client, a lawyer shall not enter into a business transaction with a client for which a fee or commission will be charged in lieu of, or in addition to, a legal fee, if the business transaction is related to the subject matter of the legal representation, any financial proceeds from the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation.

COMMENT

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage or his own advantage, unless the client consents after full disclosure. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment.

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (B) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 2.6 and Rule 5.3.

Because of actual and potential conflicts of interests, a lawyer may not sell business services to a client or former client if the proposed transaction relates to the subject matter or the proceeds of representation. For example, a lawyer who is also a securities broker or insurance agent should not endeavor to sell securities or insurance to a client when he knows by virtue of the representation that such client has received funds suitable for investment.

Rule 5.5 Client Gifts.

A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

COMMENT

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (C) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Rule 5.6 Fees from Persons other than the Client.

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(A) The client consents after full disclosure;

(B) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(C) Information relating to representation of the client is protected as required by Rule 4.

COMMENT

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. For instance, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Rule 5.6 requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 4 concerning confidentiality and Rule 5.1 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Rule 5.7 Settlement of Claims of Multiple Clients.

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an agregated agreement as to guilty or nolo contendere pleas, unless each client consents after full disclosure, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Rule 5.8 Malpractice Liability.

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a disputed claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation may be appropriate in connection therewith.

Rule 5.9 Representation of Adverse Parties by Related Lawyers.

A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after full disclosure regarding the relationship. This provision shall not be construed to disqualify other lawyers in the affected lawyer's firm.

COMMENT

Rule 5.9 applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 5.1 and 5.10. The disqualification stated in Rule 5.9 is personal and is not imputed to members of firms with whom the lawyers are associated.

Rule 5.10 Responsibility of Counsel Representing an Organization.

A lawyer who represents a corporation or other organization represents and owes his allegiance to the entity and shall not permit his professional judgment to be compromised in favor of any other entity or individual.

COMMENT

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interest and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such a case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

The lawyer representing an entity should keep in mind that confidential information received by the lawyer during the course of the professional relationship is protected by Rule 4 and may not be disclosed to persons or entities associated with the entity unless such disclosure is explicitly or impliedly authorized by the client in order to carry out the representation or as otherwise permitted by Rule 4.

The lawyer is also obligated to generally comply with Rule 5.1 concerning conflicts of interest.

Rule 5.11 Imputed Disqualification: General Rule.

(A) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the Rules of Professional Conduct, unless otherwise specifically provided herein.

(B) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rule 4 that is material to the matter.

(C) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) A lawyer remaining in the firm has information protected by Rule 4 that is material to the matter.

(D) A disqualification presented by this Rule may be waived by the affected client under the conditions stated in Rule 5.1.

COMMENT

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association with its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 9.1(A) and (B); where a lawyer represents the government after having served private clients, the situation is governed by Rule 9.1(C). The individual lawyer involved is bound by the Rules generally.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 4 and 9.1. However, if the more extensive disqualification in Rule 5.5 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 5.5 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 9.1.

The rule of imputed disqualification stated in paragraph (A) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (A) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (B) and (C).

When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved; preserving confidentiality and avoiding positions adverse to a client.

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (B) and (C) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraph (B) and (C) operates to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 4. Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented.

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 5.5(B) and (C) concerning confidentiality have been met.

CANON VI

A Lawyer Should Represent His Client Competently.

Editor's Note. — The cases cited below were decided under the Canons, Ethical Considerations and Disciplinary Rules of the Code of Professional Responsibility as it read prior to its rewrite as the Rules of Professional Conduct.

CASE NOTES

Where it appeared on the face of the notice of charges in a disciplinary proceeding that the judge may have prejudged respondent's conduct before hearing evidence on alleged violations, his order of suspension had to be vacated, and the case retained for rehearing by the Court of Appeals. In re Robinson, 37 N.C. App. 671, 247 S.E.2d 241 (1978); In re Dale, 37 N.C. App. 680, 247 S.E.2d 246 (1978).

Failure to Seek Appellate Review. — Appointed counsel who failed to seek appellate review in each of four criminal cases held in violation of former disciplinary rule. See In re Robinson, 39 N.C. App. 345, 250 S.E.2d 79 (1979).

Failure of respondent attorney to perfect an appeal in a criminal case in which the sentence of death had been imposed was a violation of former disciplinary rule. In re Dale, 39 N.C. App. 370, 250 S.E.2d 82, appeal dismissed, 296 N.C. 584, 254 S.E.2d 30 (1979).

Rule 6 Failing to Act Competently.

(A) A lawyer shall not:
  (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
  (2) Handle a legal matter without preparation adequate under the circumstances.
(B) A lawyer shall:

(1) Keep the client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(2) Explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(3) Act with reasonable diligence and promptness in representing the client.

COMMENT

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that will permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be acceptable. Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client and should be obeyed.

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 2.8, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specified matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

CANON VII

A Lawyer Should Represent His Client Zealously Within the Bounds of the Law.

Legal Periodicals. — For article, "The Role of Counsel in the Suppression of Truth," see 4 Duke L.J. 921 (1978).

For article, "The Right to Zealous Counsel," see 6 Duke L.J. 1291 (1979).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Editor's Note. — The cases cited below were decided under the Canons, Ethical Considerations and Disciplinary Rules of the Code of Professional Responsibility as it read prior to its rewrite as the Rules of Professional Conduct.

It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer, and is to be commended, because it promotes a more efficient administration of justice and saves court time.

State v. McCormick, 298 N.C. 788, 259 S.E.2d 880 (1979).

Nothing improper has occurred so long as the attorney is preparing the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth or false or perjured testimony. State v. McCormick, 298 N.C. 788, 259 S.E.2d 880 (1979).

Assistance or Participation in Perjury. — It is axiomatic that the right of a client to effective counsel in any case (criminal or civil) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

A cross-examination by which the prosecutor places before the jury inadmissible and prejudicial matter is highly improper and, if knowingly done, unethical. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

Injecting Beliefs Not Supported By Evidence. — Counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

An attorney clearly engaged in conduct which involved fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of letters which contained the opposing party's return address, while at the same time presenting to the court an affidavit which she had drafted, in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. North Carolina State Bar v. Wilson, — N.C. App. —, 330 S.E.2d 280 (1985).

Where prosecutor, in closing, made arguments based on matters outside the record by suggesting that the officers who testified against defendant could be prosecuted for perjury, fired from their jobs, and lose their retirement or pension if they lied, defendant was entitled to a new trial, as to the extent that any juror was placed in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prosecutor, the argument was improper. State v. Potter, 69 N.C. App. 199, 316 S.E.2d 359, cert. denied, — N.C. —, 323 S.E.2d 925 (1984).

Attempt to Interfere With State's Witness. — Defendant attorney's efforts on behalf of his client went far beyond representing his client "zealously within the bounds of the law," and constituted a direct attempt to interfere with a state's witness who was under subpoena to testify in a named case. State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, — U.S. —, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

A lawyer is ethically bound to advise his client of a plea bargain offer. State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Removal of Juror Justified. — The trial judge did not abuse his discretion in removing a juror and substituting alternate juror where the original juror contacted defense counsel at his home during the weekend recess and persisted in discussing matters of a personal nature, including counsel's marital status; although there was no evidence that any matter which related to the trial of defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of defendant from even the appearance of impropriety. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Ethical transgressions by trial counsel do not always constitute legal error. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Malicious Prosecution. — The North Carolina Supreme Court has refused to hold an attorney vicariously liable when his partner commits the tort of malicious prosecution. The mere fact that defendant was a partner, without evidence, direct or circumstantial, of at least his knowledge, approval, or consent, would not be sufficient to connect him with malicious prosecution. Jackson v. Jackson, 20 N.C. App. 406, 201 S.E.2d 722 (1974).

Rule 7.1 Representing the Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and these Rules, except as provided by Rule 7.1(B). A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under Rules 2.9 and 5.1.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under Rule 7.2(b).

(4) Counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning or application of the law.

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(3) Limit the objectives of the representation if the client consents after full disclosure.

(C) A lawyer shall:

(1) Abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision as to the plea to be entered, whether to waive jury trial, and whether the client will testify.

(2) Consult with the client regarding the relevant limitations on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

COMMENT

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, employment may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 6, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 4. However, the lawyer is required to avoid furthering the illicit purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (A)(4) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (A)(4) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (A)(4) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Rule 7.2 Representing the Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, controvert an issue, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would be frivolous or would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend as to require that every element of the case against his client be established.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly make a false statement of law or fact.

(5) Knowingly use perjured testimony or false evidence.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

(8) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(9) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client intends to or has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and, if the client refuses or is unable to do so, he shall discontinue his representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him to withdraw, but without necessarily revealing his reason for wishing to withdraw.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

COMMENT

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. However, an assertion purporting to be of the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 7.1(A)(4) not to counsel a client to commit or assist the client in committing a fraud applies in litigation.

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. If the false evidence is introduced before the lawyer discovers its falsity, the lawyer shall reveal the fraud to the tribunal.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must seek to withdraw.

Rule 7.3 Special Responsibilities of a Prosecutor.

The prosecutor in a criminal or quasi-criminal case shall:

(A) Refrain from prosecuting a charge that he knows is not supported by probable cause, unless otherwise directed by statutory mandate;

(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(D) Make timely disclosure to the defense of all evidence or information known to him that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to him, except when he is relieved of this responsibility by a protective order of the tribunal; and

(E) Exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with him from making an extrajudicial statement that he would be prohibited from making under Rule 7.7.

COMMENT

Editor's Note. — The Comment below is printed as received by the publisher.

The responsibility of a public prosecutor, which for these purposes includes a government lawyer having a prosecutorial role, differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts.

Prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

Paragraph (C) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

Rule 7.4 Communicating with One of Adverse Interest.

During the course of his representation of a client a lawyer shall not:

(A) Communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(B) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of his client.

(C) In dealing on behalf of a client with a person who is not represented by counsel, state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

COMMENT

This Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his participation and advice.

This Rule does not prohibit communication with a party, or an employee of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

After a lawyer for a party has been notified that an adverse or potentially adverse organization is represented by counsel in a particular matter, this rule would prohibit communications by said lawyer concerning the matter with persons having managerial responsibility on behalf of the organization, and with any other employee whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule.

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Rule 7.5 Threatening Criminal Prosecution.

A lawyer shall not present, participate in presenting, or threaten to present criminal charges primarily to obtain an advantage in a civil matter.

COMMENT

The criminal courts are intended for the use of the State in trying persons accused of violating society's penal laws. They are not intended to provide forums for the adjustment of civil disputes. A lawyer should never institute or threaten to institute criminal proceedings to gain a tactical advantage in a civil dispute.

Rule 7.6 Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

- (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.
- (2) Unless privileged or irrelevant, the identities of the clients he represents and the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

- (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
- (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
- (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
- (4) Assert his personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
- (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
(7) Intentionally or habitually violate any established rule of procedure or evidence.
(8) Engage in conduct intended to disrupt a tribunal.

COMMENT

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus, while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

Rule 7.7 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication where there is a reasonable likelihood of interference with a fair jury proceeding. A lawyer may state:

(1) Information contained in a public record.
(2) That the investigation is in progress.
(3) The general scope of the investigation including a description of the offense, and, if permitted by law, the identity of the victim.
(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
(5) A warning to the public of any danger.

(B) A lawyer associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until conclusion of jury proceedings, make or cause another person to make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood of interference with a fair jury proceeding and the statement relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
(4) The performance or results of any examination or test or the refusal or failure of the accused to submit to any examination or test.
(5) The identity, testimony, or credibility of a prospective witness.
(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) Rule 7.7(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.
(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
(3) A request for assistance in obtaining evidence.
(4) The identity of the victim of the crime.
(5) The fact, time and place of arrest, resistance, pursuit, and use of weapons.
(6) The identity of investigating and arresting officers or agencies and the length of the investigation.
(7) The nature, substance, or text of the charge.
(8) Quotations from or references to public records of the court in the case.
(9) The scheduling or result of any step in the judicial proceedings.
(10) That the accused denies the charges made against him.

(D) A lawyer shall not make or cause another person to make an extrajudicial statement regarding a civil jury proceeding (or an administrative proceeding from which or ancillary to which the right to a civil jury trial exists) that a reasonable person would expect to be disseminated by means of public communication and that the lawyer knows or reasonably should know will have a reasonable likelihood of materially prejudicing such jury proceeding and impairing the integrity of the judicial process. An extrajudicial statement will likely have such an effect when the statement relates to:

(1) The character, credibility, reputation, or criminal record (including arrests, indictments, or other charges of crime, whether past, present or forthcoming) of a party, witness, prospective party, or witness, or the expected testimony of the aforesaid, unless such information would be clearly admissible at the proceeding;
(2) A companion criminal case or proceeding in which there is a common core of facts that could result in incarceration, the possibility of a guilty plea to the offense, or the existence or contents of any confession, admission, or statement given by a party, witness, or prospective party or witness or that person's refusal or failure to make a statement, unless such information would be clearly admissible at the proceeding;
(3) The performance or results of any examination or test, or the refusal of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented at trial unless such information would be clearly admissible at the proceeding;
(4) Any opinion as to the guilt or innocence of a party, witness, or prospective party or witness in a companion criminal case or proceeding in which there is a common core of facts that could result in incarceration;

(5) The details of a settlement offer or the failure of the other party to accept a settlement offer;
(6) Information the lawyer knows or reasonably should know is likely to be inadmissible at trial and would, if disclosed, create a substantial risk of prejudicing an impartial proceeding;
(7) Any statement of law or fact which the lawyer knows to be false and which would, if stated, create a substantial risk of prejudicing an impartial proceeding;
(8) Any opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(E) Any word, phrase, or sentence in paragraph (A) above which may be found by a court to be in violation of the Constitutions of the United States or North Carolina shall be deemed severable from all other words, phrases and sentences of that paragraph.

(F) A lawyer involved in the investigation or litigation of a civil jury matter may state without elaboration:
(1) The general nature of the claim or defense;
(2) The information contained in a public record;
(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
(4) The scheduling or result of any step in litigation;
(5) A request for assistance in obtaining evidence and information necessary thereto;
(6) A warning of danger concerning the behavior of a person involved, when there is a reason to believe that such danger exists; and
(7) In a companion criminal case:
  (a) The name, age, residence, occupation, and family status of the accused.
  (b) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
  (c) A request for assistance in obtaining evidence.
  (d) The identity of the victim of the crime.
  (e) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
  (f) The identity of investigating and arresting officers or agencies and the length of the investigation.
  (g) The nature, substance, or text of the charge.
  (h) Quotations from or references to public records of the court in the case.
  (i) The scheduling or result of any step in the judicial proceedings.

(G) The foregoing provisions of Rule 7.7 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(H) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under this Rule.

(I) A lawyer, in the representation of a client, shall not knowingly make a false statement of fact, state or allude to any matter or any person not reasonably related to the client's case, or use the public record or the processes of the courts to knowingly convey false statements of fact or other information regarding any matter or any person not reasonably related to the client's case.

COMMENT

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Rule 7.8 Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) This rule does not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(F) All restrictions imposed by this rule upon a lawyer also apply to communications with or investigations of members of the family of a venireman or a juror.

(G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

COMMENT

To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with a juror is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror or a member of the family of either should make a prompt report to the court regarding such conduct.

Rule 7.9 Contact with Witnesses.

A lawyer shall not:

(A) Advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(B) Pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case, but a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

(C) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(D) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a nonexpert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

Rule 7.10 Contact with Officials.

(A) A lawyer shall not give or lend anything of substantial value to a judge, official, or employee of a tribunal.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) In the course of official proceedings in the cause.

(2) In writing, if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally, upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

COMMENT

The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

CANON VIII

A Lawyer Should Assist in Improving the Legal System.

Editor's Note. — The case cited below was decided under the Canons, Ethical Considerations and Disciplinary Rules of the Code of Professional Responsibility as it read prior to its rewrite as the Rules of Professional Conduct.

As to the taping of judge's telephone conversation to substantiate allegations of unethical conduct, see In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981).

Rule 8.1 Action as a Public Official.

A lawyer who holds public office shall not:

(A) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself, or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(B) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or his client.

(C) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

COMMENT

Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

Rule 8.2 Statements Concerning Judges and Other Adjudicatory Officers.

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

(C) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney, and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

CANON IX

A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

CASE NOTES

Editor's Note. — The cases cited below were decided under the Canons, Ethical Considerations and Disciplinary Rules of the Code of Professional Responsibility as it read prior to its rewrite as the Rules of Professional Conduct.

Disqualification. — Under Canon 4 and this Canon, if an attorney has formerly represented an adverse party in matters substantially related to the subject of the action, the attorney should be disqualified, nothing else appearing. It is not necessary to show that the attorney received confidential information. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, cert. granted, 308 N.C. 386, 302 S.E.2d 251, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

Discretion of Court as to Disqualification. — It is within the discretion of the trial court as to disqualifying an attorney for his former representation of an opposing party. This discretion must be exercised within the parameters of Canon 4 and this Canon. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, cert. granted, 308 N.C. 386, 302 S.E.2d 251, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

Factors Considered in Disqualifying Attorney. — In exercising its discretion in determining whether to disqualify an attorney, the trial court may consider the right of a party to have counsel of his or her choice and the effect a disqualification would have on the expeditious disposal of the case. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, cert. granted, 308 N.C. 386, 302 S.E.2d 251, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

Party can waive his right to have his former attorney disqualified. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, cert. granted, 308 N.C. 386, 302 S.E.2d 251, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

An attorney should not use against a former client information he has received while representing that client, even though the information is not confidential and is available to others. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, cert. granted, 308 N.C. 386, 302 S.E.2d 251, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

A prosecuting attorney for another state should not be permitted to represent a criminal defendant in this State, in order to avoid even the appearance of professional impropriety and to insure the exercise by the attorney for the defendant of independent professional judgment on his behalf. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

Rule 9.1 Successive Government and Private Employment.

(A) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after full disclosure. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter without the consent of the public agency involved.

(B) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person on a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only with the consent of the person about whom the information was obtained.

(C) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(D) As used in this Rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

(E) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

COMMENT

This Rule prevents a lawyer from exploiting public office for the advantage of a private client.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 5.1.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraph (B) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (A) and (C) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 5.1 and is not otherwise prohibited by law.

Paragraph (C) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Rule 9.2 Former Judge or Arbitrator.

(A) Except as stated in paragraph (D), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after full disclosure.

(B) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a new party in a matter in which the lawyer is participating personally and substantially as a judge, other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer, or aribtrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, or arbitrator.

(C) If a lawyer is disqualified by paragraph (A), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule.

(D) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

COMMENT

This Rule generally parallels Rule 9.1. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits.

CANON X

A Lawyer Should Strictly Preserve the Identity of Funds and Property Held in Trust.

Rule 10.1 Preserving Identity of Funds and Property of a Client.

(A) Any property received by a lawyer in a fiduciary capacity shall at all times be held and maintained separately from the lawyer's property, designated as such, and disbursed only in accordance with these rules.

(B) As a prerequisite to the receipt of any money or funds belonging to another person or entity, either from a client or from third parties, a lawyer shall maintain one or more bank accounts, separately identifiable from any business or personal account of the lawyer, which account or accounts shall be clearly labeled and designated as a trust account. The account or accounts shall be maintained at a bank in North Carolina, unless otherwise directed in writing by the client. For purposes of these Rules, the following definitions will apply:

(1) A "bank" is defined as a federally or North Carolina chartered bank, savings and loan association, or credit union.

(2) A "trust account" is an account maintained under the Rules of Professional Conduct in which the lawyer holds any funds in a fiduciary relationship, including those held on behalf of or belonging to a client, other than those funds held as a court appointed fiduciary.

(3) The term "lawyer" shall include all members of the North Carolina State Bar and any law firm in which they are members unless the context clearly indicates otherwise.

(4) The term "client" shall include all persons, firms, or entities for which the lawyer performs any services, including acting as an escrow agent.

(5) The term "instrument" shall include any instrument under the Uniform Commercial Code and any record of the electronic transfer of funds.

(C) All money or funds received by a lawyer either from a client or from a third party to be delivered all or in part to a client, except that received for payment of fees presently owed to the lawyer by the client or as reimbursement for expenses properly advanced by the lawyer on behalf of the client, shall be deposited in a lawyer trust account. No funds belonging to the lawyer shall be deposited into the trust account or accounts except:

(1) Funds sufficient to open or maintain an account, pay any bank service charges, or pay any intangibles tax, or

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer. Such funds shall be deposited into the trust account, but the portion belonging to the lawyer shall be withdrawn when the lawyer becomes entitled to the funds unless the right of the lawyer to receive the portion of the funds is disputed by the client, in which event the disputed portion shall remain in the trust account until the dispute is resolved.

(D) Except as authorized by Rule 10.3, interest earned on funds deposited in a trust account (less any deduction for bank service charges, fees of the bank, and intangible taxes collected by the bank with respect to the funds) shall belong to the client or clients whose funds have been deposited. The lawyer shall have no right or claim to such interest. A lawyer shall not use or pledge the funds held in a trust account to obtain credit or other personal financial benefit.

(E) Any property or securities belonging to a client received by a lawyer shall be promptly identified and labeled as the property of the client and placed in a safe deposit box or other place of safekeeping as soon as practicable. The lawyer shall notify the client of the location of the property kept for safekeeping by the lawyer. Any safe deposit box used to safekeep client property shall be located in this state unless the client consents in writing to another location. The lawyer shall not keep any of his or his law firm's property which is not clearly identified in such safe deposit box or other place of safekeeping.

(F) Any property or titles to property, personal or real, delivered to the attorney as security for the payment of any fee or other obligation owed to the lawyer by the client shall be held in trust under these Rules and shall clearly indicate that the property is held in trust as security for the obligation and shall not appear as a direct conveyance to the lawyer. This provision does not apply where the transfer of the property is for payment of fees presently owed to the lawyer by the client; such transfers are subject to the Rules governing fees and other business transactions between the lawyer and client.

Rule 10.2 Record Keeping and Accounting of Client Funds or Property.

(A) A lawyer shall promptly notify his client of the receipt of any funds, securities, or property belonging in whole or in part to the client.

(B) A lawyer shall maintain complete records of all funds, securities, or other property of a client received by the lawyer. A lawyer shall retain the records required under this Rule for a period of six (6) years following completion of the transactions generating the records.

(C) The minimum records of funds received and disbursed by the lawyer shall consist of the following:

(1) A journal, file of receipts, file of deposit slips, or checkbook stubs listing the source, client, and date of the receipt of all trust funds. All receipts of trust money shall be deposited intact with the lawyer retaining a duplicate deposit slip or other record sufficiently detailed to show the identity of the item. Where the funds received are a mix of trust funds and non-trust funds, then the deposit shall be made to the trust account intact and the non-trust portion shall be withdrawn when the bank has credited the account upon final settlement or payment of the instrument.

(2) A journal, which may consist of cancelled checks, showing the date, recipient of all trust fund disbursements, and the client balance against which the instrument is drawn. An instrument drawn from the account for payment of fees or expenses to the lawyer shall be made payable to the lawyer and indicate from which client balance the payment is drawn. No instruments drawn on the trust account shall be payable to cash or bearer.

(3) A file or ledger containing a record for each person or entity from whom or for whom trust money has been received which shall accurately maintain the current balance of funds held in the trust account for that person.

(4) All cancelled checks drawn on the trust account, whether or not the checks constitute the journal required in (2) above.

(5) Any bank statements or documents received from the bank regarding the account, including, but not limited to, notices of the return of any instrument drawn on the account for insufficient funds.

(D) A lawyer shall reconcile the trust account balances of funds belonging to all clients at least quarterly. A lawyer shall render to the client appropriate accountings of the receipt and disbursement of any funds, securities, or property belonging to the client in the possession of the lawyer. Accountings of funds shall be in writing. An accounting shall be provided to the client upon the completion of the disbursement of the funds, securities, or property held by the lawyer, at such other times as may be reasonably requested by the client, and at least annually if funds are retained for a period of more than one year.

(E) A lawyer shall promptly pay or deliver to the client or to third persons as directed by the client the funds, securities, or properties belonging to the client to which the client is entitled in the possession of the lawyer.

(F) Every lawyer maintaining a trust account shall file with the bank where the account is maintained a directive to the drawee bank as follows: Such bank shall report to the Executive Director of the North Carolina State Bar, solely for its information, when any check drawn on the trust account is returned for insufficient funds. No trust account shall be maintained in any bank which does not agree to make such reports pursuant to the directive.

(G) A lawyer shall produce any of the records required to be kept by this rule upon lawful demand made in accordance with the Rules and Regulations of the North Carolina State Bar.

Rule 10.3 Interest on Lawyers' Trust Accounts.

(A) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest bearing trust account for those funds of clients which, in his good faith judgment, are nominal in amount or are expected to be held for a short period of time. A lawyer may be compelled to invest on behalf of a client in accordance with Rule 10.1, only those funds not nominal in amount or not expected to be held for a short period of time. Funds deposited in a permitted interest bearing trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a depository institution authorized by state or federal law to do business in North Carolina and insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the North Carolina Guaranty Corporation. A lawyer participating in the plan shall deliver to all clients from whom or for whose benefit such funds are received a notice reading substantially as follows and comply with its provisions:

IMPORTANT NOTICE TO CLIENTS
THIS OFFICE PARTICIPATES IN THE NORTH CAROLINA
PLAN REGARDING THE GENERATION OF INTEREST ON
ATTORNEYS' TRUST ACCOUNTS.

> Under this plan, funds deposited on behalf of a client that are nominal in amount or are expected to be held for a short period of time will be deposited in an interest bearing trust account and the interest generated will be remitted to the North Carolina State Bar to fund programs for the public's benefit. The costs of maintaining an interest bearing account on an individual client's funds which are nominal in amount or held for a short period of time exceed the amount of interest that may be earned on such funds. Therefore, such client funds are placed in one trust ac-

count from which distribution is made at the client's direction and, until recent changes in banking laws, the trust account could not earn interest. Under current law, a trust account is permitted to earn interest under certain circumstances. It is only when all client funds are deposited into the single account with the interest going to a public purpose that such an account can be established. Under no conditions, including any request that the funds not be placed in such an account, can the client benefit individually from the interest earned. The attorney will not receive any of the interest generated under the plan.

(B) Lawyers or law firms electing to deposit client funds in a trust account under the plan shall direct the depository institution:

(1) To remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(2) To transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and the rate of interest applied in computing the remittance;

(3) To transmit to the depository lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance.

(C) Certificates of Deposit may be obtained by a lawyer or law firm on some or all of the deposited funds of clients, so long as there is no impairment of the right to withdraw or transfer principal immediately.

COMMENT

The purpose of an attorney's trust account is to segregate the funds belonging to clients from those belonging to the attorney. The attorney is in a fiduciary relationship with the client and should never use money belonging to the client for personal purposes. Failure to place client funds in a trust account can subject the funds to claims of the attorney's creditors or place the funds in the attorney's estate in the event of death or disability. The general rule is that every receipt of money from a client or for a client which will be used or delivered on the client's behalf is held in trust and should be placed in the trust account. Therefore, every attorney who receives funds belonging to clients must maintain a trust account.

The definitions in Rule 10.1(B) are basic and allow the rule to encompass accounts maintained at institutions other than commercial banks. Additionally, the definition of check is intended to encompass any device by which funds may be withdrawn, including non-negotiable instruments, transfers, and direct computer transfers.

Rule 10.1 is patterned after former Disciplinary Rule 9-102. However, the language used clarifies the deposit requirements. Under the prior rule there was some confusion as to whether payments of clients to attorneys for payment of expenses should be deposited in the trust account. The new language eliminates the ambiguity. Under the new rule, all money received by the attorney except that to which the attorney is presently entitled must be deposited in the trust account, including funds for payment of expenses. Funds delivered to the attorney by the client for payment of potential expenses are intended to be used for only that purpose and the funds should never be used by the attorney for personal purposes or subjected to the potential claims of the attorney's creditors.

There is a question as to whether a payment of a retainer by the client should be placed in the trust account. The determination depends upon the fee arrangement with the client. A retainer in its truest sense is a payment by the client for the reservation of the exclusive services of the attorney which by agreement of the parties is non-refundable upon discharge of the attorney. It is a payment to which the attorney is immediately entitled and should not be placed in the trust account. A "retainer" which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly basis, is not a payment to which the attorney is immediately entitled. This is really a security deposit and should be placed in the trust account. As the attorney earns the fee or bills against the retainer, the funds should be withdrawn from the account.

The attorney may come into possession of property belonging to the client other than money. Similar considerations apply concerning the segregation of such property from that of the attorney.

The lawyer must notify the client of the receipt of the client's property. It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of client property are maintained. Therefore, there are minimum record-keeping requirements.

The lawyer is also responsible for keeping his client advised of the status of any property held by the lawyer. Therefore, it is essential that the attorney reconcile the trust account regularly. The attorney also has an affirmative duty to produce an accounting for the client in writing and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least quarterly, and can be made at more frequent intervals in the discretion of the attorney.

The lawyer is also responsible for making payments from his trust account only as directed by the client or only on the client's behalf.

A properly maintained trust account should not have any checks returned by the bank for insufficient funds. Although even the best maintained accounts are subject to bank errors, such legitimate problems are easily explained. Therefore, the reporting requirement should not be burdensome.

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Adopted September 16, 1969.

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ARTICLE I.

Authority.

Section 1.1. These Rules and Regulations are issued pursuant to the authority contained in G.S. 7A-459, Chapter 1013 of the Session Laws of 1969.

ARTICLE II.

Determination of Indigency.

Section 2.1. Prior to the appointment of counsel on grounds of indigency, the Court shall require the defendant to complete and sign under oath an Affidavit of Indigency in a form approved by the Director of the Administrative Office of the Courts.

Section 2.2. Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the Affidavit of Indigency.

Section 2.3. The defendant's Affidavit of Indigency shall be filed in the records of the case.

Section 2.4. Upon the basis of the defendant's Affidavit of Indigency, his statements to the Court on this subject, and such other information as may be brought to the attention of the Court which shall be made a part of the record in the case, the Court shall determine whether or not the defendant is in fact indigent.

ARTICLE III.

Waiver of Counsel.

Section 3.1. Any defendant desiring to waive the right to counsel as provided in G.S. 7A-457 shall complete and sign under oath a Waiver of Counsel in a form approved by the Director of the Administrative Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the Court shall so certify in a form approved by the Director of the Administrative Office of the Courts.

Section 3.2. Prior to the call of the case for trial, the Judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his right to counsel.

Section 3.3. The Judge, upon being so satisfied, shall accept the Waiver of Counsel executed by the defendant, sign the same and cause it to be filed in the record of the case.

ARTICLE IV.

Appointment of Counsel.

Section 4.1. The North Carolina State Bar shall adopt a model plan for the appointment of counsel for indigent persons charged with certain crimes or otherwise entitled to representation. Each judicial district bar not served by a public defender's office shall adopt a plan for the appointment of counsel for indigent persons which provides for the appointment of experienced counsel for persons charged with serious crimes, with respect to which the Model plan may serve as a guide or example. Such plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district. (Amended November 19, 1984.)

Section 4.2. Such plan or plans as adopted by the judicial district bar shall be certified to the Council of the North Carolina State Bar for its approval, following which the plan or plans shall be certified to the Clerk of Superior Court of each county to which each plan is applicable by the Secretary of the North Carolina State Bar and shall constitute the method by which counsel shall be selected in said districts for appointment of counsel to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge in the exercise of his discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district, who is or are not on the plan or list certified to the Clerk of Superior Court, and if so, he is authorized to appoint as counsel to represent an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district. (Amended November 19, 1984.)

Section 4.3. No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he resides or maintains an office except by consent of counsel so appointed.

Section 4.4. No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him.

Section 4.5. The Clerk of Superior Court of each county shall file or record in his office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the Secretary of the North Carolina State Bar. (Amended November 19, 1984.)

Section 4.6. The Clerk of Superior Court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him by the Secretary of the North Carolina State Bar. (Amended November 19, 1984.)

Section 4.7. Orders for the appointment of counsel shall be entered by the court in a form approved by the Director of the Administrative Office of the Courts.

Section 4.8. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, an indigent defendant charged with a capital offense shall be entitled to be represented by one counsel provided in appropriate cases in the discretion of the Court one additional assistant counsel at either the trial or appellate level, or both, may be appointed. (Added May 26, 1978.)

Section 4.9. Notwithstanding any other provisions of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office. (Added May 26, 1978.)

Section 4.10. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided, that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the trial judge to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Unless good cause is shown an attorney representing the indigent defendant at the trial level shall represent him at the appellate level if the attorney is otherwise qualified under the provisions of this section. (Added May 26, 1978.)

ARTICLE V.

Withdrawal by Counsel.

Section 5.1. At any time during or pending the trial or re-trial of a case, the trial Judge, the appointing judge, or the resident judge of the district, upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.

Section 5.2. At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the Appellate Court for permission to withdraw from the defense of the case upon the appeal.

Section 5.3. Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

CASE NOTES

Withdrawal Where Counsel Finds Appeal Wholly Frivolous or Lacking in Merit. — In appeals wholly frivolous or simply lacking in merit, counsel should avoid the dilemma of deciding between his professional and personal integrity as an attorney and the right of the defendant to the assistance of counsel. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

If a court-appointed counsel finds an appeal to be wholly frivolous and desires to be released of further responsibility, he should apply to the Supreme Court of North Carolina for permission to withdraw as appellate counsel. If this statutory procedure is followed, the Supreme Court of North Carolina could determine by the application of State and federal requirements whether the appeal is wholly frivolous, and whether to grant counsel's request to withdraw and dismiss the appeal, or proceed to a decision on the merits. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

There is a distinction between cases that are wholly frivolous in which counsel may be permitted to withdraw, and those apparently lacking in merit, but presenting arguable questions. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

If a court-appointed counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds, it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. Virgil v. Harris, 299 F. Supp. 509 (E.D.N.C. 1969).

ARTICLE VI.

Procedure for Payment of Compensation.

Section 6.1. Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application enter an order allowing such compensation as is provided in G.S. 7A-458.

Section 6.2. Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate.

Section 6.3. Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the Director of the Administrative Office of the Courts.

Section 6.4. Two certified copies of the order for the payment of fees shall be forwarded by the clerk of the Superior Court to the Administrative Office of the Courts, Attention: Assistant Director, Raleigh, North Carolina, for payment.

Section 6.5. Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the Director of the Administrative Office of the Courts.

Section 6.6. Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the Court. (Added August 31, 1973.)

MODEL PLAN

REGULATIONS FOR APPOINTMENT OF COUNSEL IN INDIGENT CASES IN THE ________ JUDICIAL DISTRICT

ARTICLE I.

Purpose.

The purpose of these regulations is to provide for effective representation of indigent criminal defendants at all stages of trial and appellate proceedings.

ARTICLE II.

Applicability.

These regulations apply to any criminal case arising in the ________ Judicial District in which the court has determined that the defendant is entitled to the appointment of counsel. Reference to the masculine gender shall be construed to include both male and female persons. Reference to the singular shall, as appropriate, be construed to include the plural.

ARTICLE III.

Lists of Attorneys.

Section 3.1. Any attorney engaged in the private practice of law primarily in the ________ Judicial District who

(a) Maintains an office in the ________ Judicial District, and

(b) Practices criminal law in the courts of the ________ Judicial District to an appreciable extent, or intends or desires to do so,

may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorneys will be placed on the lists.

Section 3.2. Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies punishable by imprisonment for not more than five years.

Section 3.3. Attorneys on the second list may be appointed to represent defendants charged with misdemeanors or felonies other than capital crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

Section 3.4. Attorneys on the third list may be appointed to represent defendants charged with any crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

Section 3.5. To insure an orderly transition from operation under any regulations presently in effect to operation under these regulations, the Committee on Indigent Appointments shall, prior to the effective date of these regulations, meet and develop three lists of attorneys of the types described herein from the roster of attorneys currently accepting appointments in indigent cases in the __________ Judicial District. The first list shall include all such attorneys who have been licensed less than two years or who have been admitted by comity. The second list shall include all such attorneys who have been licensed for two years or more. The third list shall include all such attorneys who have had not less than five years experience in the general practice of law and who have demonstrated proficiency in the field of criminal trial practice. With respect to these initial lists, any other requirement not otherwise met by any listed attorney is hereby waived unless the committee determines that it ought not to be waived.

Section 3.6. Subject to the exception contained in Section 3.5, requirements for inclusion on the three lists are as follows:

(a) An attorney licensed to practice law in North Carolina may be included on the first list if the Committee on Indigent Appointments finds that:

(1) He is competent to represent criminal defendants charged with misdemeanors and felonies, and

(2) Two attorneys who have engaged in the practice of law in the __________ Judicial District for not less than three years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with misdemeanors and felonies and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation.

(b) An attorney who has been licensed to practice law in North Carolina for not less than two years or who has been admitted to the North Carolina State Bar by comity may be included on the second list if the committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the __________ Judicial District for not less than four years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with felonies and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He is competent to represent criminal defendants charged with felonies.

(c) An attorney who has been licensed to practice law in North Carolina for not less than five years may be included on the third list if the committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the ____________ Judicial District for not less than five years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent defendants charged with capital crimes and that they recommend that he be included on the third list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He has not less than five years experience in the general practice of law, provided that the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any District Attorney's office, and

(4) He is competent to represent criminal defendants charged with capital crimes.

ARTICLE IV.

Committee on Indigent Appointments.

Section 4.1. A Committee on Indigent Appointments is hereby established to assist in the implementation of these regulations. The committee shall have authority to act when the regulations become effective.

Section 4.2. All members of the committee shall be attorneys who

(a) Are included on one of the appointment lists, and

(b) Have practiced criminal law in the ____________ Judicial District, whether as a prosecutor or defense counsel, for not less than five years, and

(c) Are knowledgeable about practicing attorneys in the ____________ Judicial District.

Section 4.3. The committee shall consist of ______ members appointed by the President of the ____________ Judicial District Bar. At least one member shall be appointed from each county in the district. Members of the committee shall be appointed for terms of two years, except that initially a minority of the members shall be designated to serve one year terms in order to stagger terms. The appointments shall be made by letter, a copy of which shall be maintained in the records of the committee. No member shall serve two consecutive terms, except that a person who has been appointed to replace a member who did not complete his term may be appointed to a full term following his completion of the partial term. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced for his term as soon as practicable.

Section 4.4. The President of the ____________ Judicial District Bar shall appoint one of the members as Chairman of the Committee, who shall serve at the pleasure of the president as shall all other members of the committee.

Section 4.5. The committee shall meet at the call of the Chairman upon reasonable notice. The first meeting shall be on ________________. Thereafter, the committee shall meet as often as is necessary to dispatch its business.

Section 4.6. The committee shall have complete authority to accomplish the following:

(a) Supervise the administration of these regulations;

(b) Review requests from attorneys concerning their placement on any list and obtain information pertaining to such placement;

(c) Approve or disapprove an attorney's addition to or deletion from any list or the transfer of any attorney from one list to another, provided that an attorney's request to be deleted from a list or transferred to a lower numbered list shall not require committee approval.

(d) Establish procedures with which to carry out its business;

(e) Interview attorneys seeking placement on any list and witnesses for or against such placement.

Section 4.7. A majority of the committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required in order for the motion to pass or for the action to be taken.

Section 4.8. The committee shall meet in private, except it may invite persons to make limited appearances to be interviewed. Discussions of the committee, its records, and its actions shall be treated as confidentially as possible. The names of the members of the committee shall not be confidential.

ARTICLE V.

Placement of Attorneys on List.

Section 5.1. Any attorney who wishes to have his name added to or deleted from any list, or to have his name transferred from one list to another, shall file a written request with the administrator. The request shall include information that will facilitate the committee's determination whether the attorney meets the standards set forth in Article III for placement on a certain list. The written statements of competency required by Article III must be attached to the request.

Section 5.2. The administrator shall maintain records for the committee and shall advise each member of the committee of the name of the requesting attorney and the nature of his request before the committee meets to review the request. The administrator shall assure that all requests properly filed are brought to the committee's attention at the next meeting at which it is practicable for the committee to review the request.

Section 5.3. The administrator shall assure that all District Court Judges, Resident Superior Court Judges, any special Superior Court Judge with a permanent office in the ____________ Judicial District, and the District Attorney for the ____________ Judicial District are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the committee.

Section 5.4. When the committee meets to review placement requests, it may require any requesting attorney to appear before it to be interviewed and may require information in addition to that submitted in the request. Any member of the committee may discuss requests with other members of the bar in a confidential manner and may relate information obtained thereby to the other members. Rules of evidence do not apply with respect to the review of requests. The committee may hold a request in abeyance for a reasonable period of time while obtaining additional information.

Section 5.5. The committee shall determine whether an attorney requesting to be added to a list when he is not currently on any list or to be transferred from a lower numbered list to a higher numbered list (such as from the first list to the second list) meets all the applicable standards set out in Article III. The request shall be granted or the addition or transfer allowed if the committee finds that he does meet all the standards. Conversely, the request shall be denied if the committee does not find that he meets all the standards. The findings shall be reduced to writing and kept in the regular records of the committee by the administrator. The committee shall assure that the requesting attorney is given prompt notice of the action taken with respect to his request and is advised of the basis for denial if the request is not granted.

Section 5.6. Only the senior resident superior court judge may, in his discretion, delete the name of an attorney from a list or transfer an attorney from a higher numbered list to a lower numbered list.

Section 5.7. If at any time it reasonably appears to the committee that an attorney no longer meets a standard set forth in Article III for the list on which he is placed, or that he can no longer meet the responsibilities of representing indigent defendants with respect to such list, the committee shall direct the attorney to show cause why he should not be deleted from the list or transferred from a higher numbered list to a lower numbered list. If the attorney cannot show sufficient cause, the committee may take appropriate action, including suspending the attorney from receiving appointments in indigent cases for a definite or indefinite time, or deleting his name from the list he is on, or transferring him from a higher numbered list to a lower numbered list. Appropriate written findings shall be made by the committee in this regard, and the attorney shall be informed of the basis of any action taken.

Section 5.8. Whenever an attorney who provides information to the committee, collectively or through any member, requests that his name not be used or that his information be treated confidentially, his request shall be granted unless doing so results in manifest unfairness.

ARTICLE VI.

Appointment Procedure (Non-Capital Cases).

Section 6.1. The administrator shall provide the clerk in each courtroom in the district and Superior Criminal Courts of the __________ Judicial District with current lists of attorneys subject to appointment in indigent cases. Attorneys shall be appointed only in accordance with the lists on which they appear, and only in cases to be tried in counties in which they maintain offices, unless they agree in advance to accept cases from other counties.

Section 6.2. Each courtroom clerk shall maintain an alphabetical record of attorneys subject to appointment to represent indigents. Beside each attorney's name shall appear the number of any list he is on. The court shall proceed in alphabetical sequence in appointing attorneys. If an attorney's name is passed over because he is not on a list relating to particular charge, the court shall return to his name for the next appointment consistent with his lists. The court may pass over the name of any attorney known not to be reasonably available because of vacation, illness, or other reasons.

Section 6.3. In its discretion, the court may appoint an attorney in any case without regard to alphabetical sequence or an attorney not maintaining an office in the county where the case is to be tried.

Section 6.4. The clerk shall provide notice of the appointment to the attorney concerned as soon as possible. Further, the clerk shall advise the defendant of the name of his attorney.

Section 6.5. The court may appoint an attorney to represent more than one defendant in a single case.

ARTICLE VII.

Appointments in Capital Cases.

Section 7.1. In addition to the provisions of Article VI, the provisions of this Article shall apply to the appointment of counsel in capital cases.

Section 7.2. An indigent defendant charged with a capital offense shall be entitled to be represented by one counsel, except that in appropriate cases in the discretion of the court, one additional counsel may be appointed at either the trial or appellate level, or both levels. The assistant counsel may be on the second list or the third list of attorneys.

Section 7.3. No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime:

(a) Who has less than five years experience in the general practice of law, provided that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

ARTICLE VIII.

Appellate Appointments.

Section 8.1. If a criminal defendant who has given notice of appeal from a conviction is found to be eligible, because of indigency, for appointment of counsel at the appellate level, the attorney representing the defendant at the trial level shall be appointed to represent the defendant at the appellate level if the attorney is included on at least one of the lists described herein, and, if not, may be appointed only with his (the attorney's) consent. If the attorney representing the defendant at the trial level was retained, he may be appointed to represent the defendant at the appellate level even though he does not meet all the requirements of Article III or the other pertinent provisions of these regulations. For good cause, the attorney at the trial level may be relieved of responsibility for the appeal. Whenever it is otherwise necessary to appoint an attorney to represent an indigent person at the appellate level, the attorney appointed shall be selected in a manner consistent with appointment of counsel at the trial level.

Section 8.2. No attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime:

(a) Who has less than five years experience in the general practice of law, provided, however, that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the court to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

ARTICLE IX.

Administration.

Section 9.1. The Senior Resident Superior Court Judge for the ______ Judicial District shall designate a person to serve as administrator of these regulations.

Section 9.2. The administrator will perform the duties described previously and particularly shall:

(a) Maintain records relating to these regulations and to the actions of the Committee on Indigent Appointments;

(b) Keep current the three lists of attorneys;

(c) Assist the courtroom clerks and the Clerk of Superior Court in carrying out these regulations;

(d) Attend meetings of the committee as appropriate;

(e) Inform the judges of the district and the district attorney and the members of the committee of requests by attorneys concerning placement on any lists;

(f) Perform other administrative tasks necessary to the implementation of these regulations.

Section 9.3. The administrator shall have such office, supplies, and equipment as can be provided by the Senior Resident Superior Court Judge or the committee.

Section 9.4. The Clerk of Superior Court of each county in the ____________ Judicial District shall file and keep current these regulations for the assignment of counsel as certified to him by the Secretary of the North Carolina State Bar.

Section 9.5. The Clerk of Superior Court of each county in the ____________ Judicial District shall keep a record of all counsel eligible for appointment under these regulations and a permanent record of all appointments made in his county.

ARTICLE X.

Miscellaneous.

Section 10.1. These regulations are issued pursuant to Article IV of the rules and regulations promulgated in accordance with North Carolina General Statute 7A-459 by the North Carolina State Bar Council, entitled Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases, as set out in the Rules Volume of The General Statutes of North Carolina (published by The Michie Company). Nothing contained herein shall be construed or applied inconsistently with the regulations established by the North Carolina State Bar Council or with other provisions of state law.

Section 10.2. It is recognized that the court has the inherent discretionary power in any case to decline to appoint a particular attorney to represent an indigent person. It is also recognized that occasionally the court may determine that the interests of justice would be best served by appointing a particular lawyer to handle a particular case even though he is not next in alphabetical sequence or does not maintain an office in the county where the case is to be tried.

Section 10.3. These regulations shall be construed liberally in order to carry out the purpose stated in Article I.

Section 10.4. These regulations shall become effective on ____________, and shall supersede any existing regulations or plan concerning the appointment of counsel in indigent cases.

APPROVED AND PROMULGATED THIS _______ DAY OF _________, 198 ____.

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NORTH CAROLINA SUPREME COURT LIBRARY RULES

Adopted December 20, 1967.

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Appendix I

Official Register, State of North Carolina

General Provisions

1. Short Title.

The following rules and regulations shall be known and may be cited as North Carolina Supreme Court Library Rules.

2. Definitions.

Subject to additional definitions contained in subsequent sections and applicable to specific parts of these Rules, and unless the context otherwise requires, the following definitions shall apply for purposes of these Rules:

(a) "Assistant Librarian" means the Assistant Librarian of the Supreme Court Library.

(b) "Librarian" means the Librarian of the Supreme Court Library.

(c) "Library" means the North Carolina Supreme Court Library.

(d) "Library Committee" means that committee appointed and acting pursuant to G.S. 7A-13 of the General Statutes of North Carolina.

(e) "Library material" means any book, paper, document, map, magazine, pamphlet, newspaper, manuscript, film, periodical, or other item or material, regardless of physical form of characteristics, that is a part of the collection or holdings of the Library.

(f) "Official Register" means that list of positions of the State of North Carolina that is appended to these Rules as Appendix I.

(g) "Rules" means any rules or regulations contained in the North Carolina Supreme Court Library Rules.

(h) "Staff" means any assistants or other persons or employees appointed by or working under the supervision of the Librarian of the Supreme Court Library. (Amended November 28, 1972.)

Hours and Use of Library

3. Hours.

Except when the Library Committee authorizes that it be closed, the Library shall be open for public use on Monday through Friday from eight-thirty o'clock in the morning until five o'clock in the afternoon. (Amended July 24, 1980; November 8, 1983, eff. January 1, 1984.)

4. Use during Regular Hours.

Any person who conducts himself in a quiet, orderly, and lawful manner and who abides by the Rules and the reasonable requests of the staff may visit the Library and reasonably use its material to such extent, in such manner, and for such duration as in the discretion of the Librarian or Assistant Librarian reasonably does not or will not interfere with the performance of the Library's primary function of serving the Appellate Division of the General Court of Justice.

5. Use after Hours.

Only members and employees of the Supreme Court and the Court of Appeals may enter the Library or use the material or facilities of the Library when the Library is not open for public use. (Amended April 14, 1975; July 24, 1980; September 1, 1982.)

6. Entrance and Exits.

All visitors and users of the Library shall enter and leave the Library through an elevator except in emergency situations and times when an elevator is not in operation.

7. Conduct.

Smoking, consumption of food or beverages other than from water fountains in the Library, loud talking, boisterous or disorderly conduct, and the use of dictating equipment shall not be permitted in the Library.

Use of Material

8. Clearing of Tables.

At the end of each day the staff shall clear all tables and reshelve all unshelved books in the reading area of the Library; however, provided that no books shall be left on tables for more than two consecutive nights, the staff may leave material on tables overnight when the person using the material leaves on it a signed and dated request that it not be reshelved.

9. Abuse of Material.

No person shall damage or abuse any Library material or equipment in any respect. Marking, writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, or breaking such material or equipment, or folding pages, closing a book with a writing instrument or other object within it, tearing out or removing any page or pocket part without authority, or stacking other books or heavy objects on an open book are included within this prohibition.

10. Replacement of Lost Materials.

Any person who unintentionally or inadvertently shall lose or misplace any Library material and for that reason fail to return it within the time that it is due to be returned shall, within thirty (30) days from such due date, make such replacement as will be acceptable to the Librarian in his discretion, or pay to the Library the fair value of the material as determined by the Librarian.

Services

11. Copy Service, Fees, and Certification.

The Library shall operate a copy service by means of which it shall furnish requested copies of all or portions of any Library material that legally may be copied, such copies to be furnished subject to the following terms and conditions:

(a) All copies requested by members and employees of the Supreme Court and the Court of Appeals shall be furnished without charge.

(b) Provided that the number of copies requested at any one time does not exceed ten (10) pages, or with the permission of the Librarian or the Assistant Librarian regardless of the number of copies requested, the Library shall furnish without charge such copies as personally are requested by persons holding positions listed in the Official Register and that such persons state are to be used in the discharge of their official duties; however, when the request is for more than ten (10) pages at any one time, or total requests from the same person in any single month exceed fifty (50) pages, the Librarian or Assistant Librarian may require the approval of the Library Committee before making such copies without charge, such approval then to be given only for good cause shown and upon the written and signed application of the person requesting the copies.

(c) Except as provided for in sections (a) and (b) of this Rule, the Library shall charge and collect a fee of twenty cents ($.20) per page for each copy that it makes.

(d) The Librarian shall charge and collect a fee of one dollar ($1.00) for each individual case, statute, or other distinct item that he certifies pursuant to G.S. 7A-13(f) of the General Statutes of North Carolina, except that certificates requested by persons holding positions listed in the Official Register shall be provided without charge. Preparation of copies to be certified and the charges therefor, if any, shall be as provided by sections (a), (b) and (c) of this Rule.

(e) Fees for making or certifying copies shall be paid on or before delivery, except that copies requested by members of the North Carolina State Bar, Inc., may be made and delivered upon the condition that full payment will be made within forty-eight (48) hours after the delivery of the copies.

(f) Patrons may make their own photocopies for ten cents ($.10) per page. (Amended July 24, 1980.)

12. Research Service.

No member of the Library staff shall do law research for or give legal advice or counsel to any person except as requested by a member of the Supreme Court or the Court of Appeals for his own use, or as authorized by the Librarian.

Borrowing and Removing Material

13. Who May Borrow Material.

The following persons only may borrow and remove material from the Library:

(a) Members and employees of the Supreme Court and the Court of Appeals, in person or upon his or her signed memorandum.

(b) The Attorney General and members of his staff who are members of the North Carolina State Bar, Inc., in person or upon his or her signed memorandum.

(c) The Governor and members of the Council of State, in person or upon his or her signed memorandum.

(d) The President of the Senate, the Speaker of the House of Representatives, and the respective chairmen of the committees of the General Assembly, in person or upon his or her signed memorandum.

(e) The heads or duly constituted representatives of established agencies or institutions that offer reciprocal services to the Library and that are engaged in what the Librarian in his discretion deems to be worthy educational, historical, library, archival, or bibliographical activity for which they have a legitimate need to borrow the material requested.

(f) The Secretary-Treasurer of the North Carolina State Bar, Inc. (Amended July 24, 1980.)

14. Return of Borrowed Material.

Material borrowed from the Library shall be returned to the Library within the time provided below:

(a) Members of the Supreme Court and the Court of Appeals shall return borrowed material as early as possible, but in no event shall any item be retained for more than one week from the time of borrowing.

(b) Borrowers who are not members of the Supreme Court or the Court of Appeals shall return borrowed material before the closing of the Library on the day that the item is borrowed except when upon the borrower's written request stating good reason the Librarian or the Assistant Librarian in his or her respective discretion authorizes that any specific item be retained by the borrower until a later time as set by the Librarian or the Assistant Librarian.

15. Receipts for Borrowed Material.

Each person who borrows material from the Library shall give a receipt therefor on a form prescribed for that purpose by the Librarian and available in the Library.

16. Borrowing Proscriptions and Limitations.

The Librarian in his discretion may limit or proscribe the borrowing of old books, rare books, digests, indexes, general reference materials, looseleaf services, encyclopedias, advance sheets, and other materials that because of their particular value, nature, or frequent use should remain in the Library at all times or have only limited circulation.

17. Removal from the Justice Building.

No borrower, except a Judge of the Court of Appeals upon his written request, may remove any Library material from the Justice Building except when each of the following conditions exists:

(a) It is not reasonably possible for the person desiring to use the material to do so within the Justice Building.

(b) It is impracticable to copy the material by use of the facilities available in the Justice Building, or such copies reasonably would not serve the purpose of the person desiring to borrow the material.

(c) Material that is identical or substantially the same may not be borrowed and removed from the North Carolina State Library or any other public library in Raleigh.

(d) The material is not out of print and it reasonably could be replaced.

(e) The Library has more than one copy of the material.

18. Transportation of Material.

Library materials may not be sent through State Interoffice Mail or transported by or through any other person, agency, or means that the Librarian in his discretion deems unsafe.

Internal Rules

19. Policies and Procedures.

The Librarian shall be responsible for the general administration of the Library, and he shall execute the policies established by the Library Committee.

Penalty

20. Contempt of Court.

Any person who intentionally and wilfully violates any North Carolina Supreme Court Library Rule shall, upon formal complaint filed in the Supreme Court by the Librarian, be subject to being adjudged in contempt of the Supreme Court.

Records and Annual Report

21. Records and Annual Report.

The Librarian shall keep Library records in a form acceptable to the Library Committee, and on or before September 1 of each year he shall make to the Supreme Court a summary report of Library activities for the fiscal year that ended on the preceding June 30.

Appendix I

OFFICIAL REGISTER, STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Legislative Services Officer, Director of Legislative Drafting, and Director of Research for the General Assembly.

(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(3) The Secretary of the Department of Administration, Secretary of the Department of Commerce, Secretary of the Department of Correction, Secretary of the Department of Crime Control and Public Safety, Secretary of the Department of Cultural Resources, Secretary of the Department of Human Resources, Secretary of the Department of Natural Resources and Community Development, Secretary of the Department of Revenue, and Secretary of the Department of Transportation.

(4) The Judges of the Superior Court and the Judges of the District Court.

(5) The District Attorneys and the Public Defenders.

(6) The State Librarian.

(7) The Director of the Division of Archives and History.

(8) The Director, Assistant Director, and Counsel of the Administrative Office of the Courts.

(9) The Chairman of the Judicial Standards Commission.

(10) The Secretary-Treasurer of the North Carolina State Bar, Inc.

(11) The State President of the Department of Community Colleges. (Added November 28, 1972; amended July 24, 1980; June 21, 1984.)

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Revised effective April 1, 1984.

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Editor's Note. — Each local rule follows the numbering scheme of the Federal Rules of Appellate Procedure to which it pertains and there has been an attempt by the court not to repeat any information that can be found in the body of any appellate rule. Whenever possible, information concerning practices and procedures of the court are set forth in the published internal operating procedures of the court rather than in the local rules. The court has adopted a local rule only in those circumstances where the rule establishes specific affirmative obligations on the parties proceeding before the court, delegates additional authority to the clerk or creates certain options which the Federal Rules of Appellate Procedure indicate can only be exercised by creation of a local rule.

Rule 15. Brief and argument in NLRB applications for enforcement.

In an application for enforcement by the National Labor Relations Board under Rule 15(b), Federal Rules of Appellate Procedure, the respondent(s) shall be considered the petitioner(s) and the National Labor Relations Board considered the respondent, solely for the procedural purpose of briefing and oral argument, unless the court orders otherwise. Nothing in this rule shall have the effect of changing or modifying the National Labor Relations Board's burden of establishing its right to enforcement.

Rule 21. Petitions for special writs.

A petition for a writ of mandamus or writ of prohibition shall not bear the name of the district judge, but shall be entitled simply, In re __________, Petitioner. To the extent that relief is requested of a particular judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge.

Rule 22(a). Certificates of probable cause.

The chief judge may refer to a panel or panels of judges any application for certificate of probable cause to appeal a final order in a habeas corpus proceeding where the detention complained of arises out of process by a state court. If all the judges of the panel conclude that the certificate should not issue, the certificate will be denied; but if any judge of such panel is of the opinion that the issue is debatable and that full briefing and oral argument would be of assistance, the certificate will be issued and the case set for a regular hearing.

Rule 22(b). Death penalty cases and motions for stay of execution.

Whenever a petition for writ of habeas corpus in which a sentence of death is involved is filed in the district court or the Court of Appeals, the petitioner shall file with his petition a statement certifying the existence of a sentence of death and the emergency nature of the proceedings and listing any proposed date of execution, any previous cases filed by petitioner in federal court and any cases filed by petitioner pending in any other court. The clerk of the district court shall immediately forward to the Court of Appeals a copy of any such statement filed, and shall immediately notify by telephone the Court of Appeals upon issuance of a final order in that case. If a notice of appeal is filed, the clerk of the district court shall transmit the available record forthwith. The clerk of the Court of Appeals will maintain a special docket for such cases and these cases shall be presented to the Court of Appeals on an expedited basis.

Any motion for stay of execution shall be considered initially in conjunction with any pending application for a certificate of probable cause. Should a party file a motion to stay execution or a motion to vacate an order granting a stay of execution, the following documents shall accompany such motion:

1. The complaint or petition to the district court;
2. Each brief or memorandum of authorities filed by either party in the district court;
3. Any available transcript of proceedings before the district court;
4. The memorandum opinion giving the reasons advanced by the district court for denying relief;
5. The district court judgment denying relief;
6. The application to the district court for a certificate of probable cause to appeal;
7. The application to the district court for stay;
8. The certificate of probable cause or order denying a certificate of probable cause in matters originating in state courts;
9. The district court order granting or denying a stay and a statement of reasons for its action; and

10. A copy of the docket entries of the district court. (Added June 1, 1984; Amended eff. February 6, 1985.)

Rule 27(a). Argument of motions.

Motions shall be considered and decided by the court upon the motion papers and briefs. Unless otherwise ordered by the court, no motion shall be orally argued.

Rule 27(b). Noncontroversial orders granted by clerk; reconsideration thereof.

Motions and applications for orders if consented to, or if unopposed after due notice to all interested parties has been given or waived, or if the orders sought are formal or relate to the preparation or printing of the appendix and briefs on appeal, or are such as are ordinarily granted as of course and without notice or hearing, need not be submitted to the court, or to a judge thereof. Such orders may be entered for the court by the clerk, who shall forthwith send copies thereof to the parties.

Any party adversely affected by an order entered by the clerk pursuant to this rule shall be entitled to request reconsideration of the clerk's action by the court, if within fourteen days after entry of the order, such party shall file with the clerk and serve upon the parties to the proceedings a request, in writing, for reconsideration, vacation or modification of the order, stating the grounds for such request. The clerk shall thereupon submit to the court the request for reconsideration, vacation or modification the motion or application upon which the order was entered, and any responses by other parties which may have been filed in support or opposition to the request. The court may thereafter take such action as may be proper.

Rule 28(a). Consolidated cases and briefs.

Related appeals or petitions for review will be consolidated in the office of the clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the clerk within seven (7) days of the date of the order of consolidation. In the absence of an agreement by counsel, the clerk shall designate lead counsel. The individual so designated shall be responsible for the coordination, preparation and filing of the briefs and appendix.

Editor's Note. — This rule was formerly designated as Rule 28, and was redesignated by the court as Rule 28(a) effective February 6, 1985.

Rule 28(b). Briefs and joint appendix in cross appeals.

Absent agreement of the parties, the party filing the first notice of appeal in a case with a cross appeal will be designated by the clerk as the appellant for purposes of the rules on briefing, appendix and oral argument. (Added eff. February 6, 1985.)

Rule 31. Shortened time for service and filing of briefs in criminal cases.

Pursuant to the authority conferred by FRAP 31(a), the time for serving and filing briefs in criminal appeals is shortened as follows: the appellant shall serve and file his brief and appendix within thirty-five days after the date on which the briefing order is filed; the appellee shall serve and file his brief within twenty-one days after the service of the brief of the appellant; the appellant may serve and file a reply brief within ten days after service of the appellee.

Rule 34(a). Oral argument; pre-argument review and summary disposition of appeals; statement regarding the need for oral argument.

In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may designate a panel or panels to review any pending case at any time before argument for disposition under this rule.

In reviewing pending cases before argument, the panel will utilize the minimum standards set forth in FRAP 34(a). If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument is not to be allowed, they may make any appropriate disposition, without oral argument, including but not limited to, affirmance or reversal.

In furtherance of the disposition of pending cases under this rule, any party may include in his brief at the conclusion of the argument section a statement setting forth the reasons why, in his opinion oral argument should be heard.

Rule 34(b). Informal briefs.

Whenever an application for a certificate of probable cause from the denial of a writ of habeas corpus or an appeal taken from the denial of a motion under 28 U.S.C. § 2255, or any pro se appeal shall be filed, the clerk shall notify the appellant that he may file within twenty-one days after receipt of such notice, an informal brief, describing the grounds upon which he claims he is entitled to relief and setting forth the merits of his appeal. Any such informal brief filed by any party shall be considered, together with the record and other relevant papers, by the panel to which the proceeding has been referred.

Parties proceeding pursuant to this section shall be provided copies of this local rule by the clerk.

Rule 35. In banc proceedings.

(a) Suggestion for Rehearing in Banc.

A suggestion for rehearing in banc must be made at the same time, and in the same document, as a petition for rehearing. The fact of such suggestion shall be stated plainly in the title of the petition. The petition and suggestion will be distributed to all active and senior judges of the Court, and to any visiting judge who may have heard and decided the appeal.

(b) Decision to Hear or Rehear a Cause in Banc.

A majority, but no fewer than four, of all eligible, active and participating judges may grant a hearing or rehearing in banc. Unless a judge requests that a poll be taken on the suggestion none will be. If no poll is requested, the panel's order on a petition for rehearing will bear the notation that no member of the Court requested a poll. If a poll is requested, the order will reflect the vote of each participating judge. A judge who joins the Court after a suggestion has been submitted to the Court, and before an order has been entered, will be eligible to vote on the decision to hear or rehear a cause in banc.

(c) Decision of Causes Heard or Reheard in Banc.

An in banc hearing will be before all eligible, active and participating judges of the Court, but no fewer than six. An in banc rehearing will be before all eligible, active and participating judges, and any senior judge of the Court who sat on the panel that heard the cause originally. A judge who joins the Court after argument or submission of a cause to an in banc Court will not be eligible to participate in the decision of the cause. Granting of rehearing in banc vacates the previous panel judgment and opinion; the rehearing is a review of the judgment of the district court and not a review of the judgment of the panel. (Added eff. December 6, 1984.)

Rule 39. Printing costs.

The cost of printing or otherwise producing necessary copies of briefs and appendices shall be taxable as costs at a rate equal to the actual cost, but not higher than $10.00 per page of standard typographical printing or its equivalent or $4.00 per page of photographic reproduction of typed material. To promote greater efficiency, accuracy, and economy of appellate procedure, the court looks with favor upon the utilization of any duplicating or copying process which produces a clear black image on white paper.

Rule 45. Dismissals for failure to prosecute.

When an appellant in either a docketed or non-docketed appeal fails to comply with the Federal Rules of Appellate Procedure and the rules of this court, the clerk shall notify the appellant and his counsel that upon the expiration of fifteen (15) days from the date thereof the appeal will be dismissed for want of prosecution, unless prior to that date appellant remedies the default. Should the appellant fail to comply within said fifteen-day period, the clerk shall then enter an order dismissing said appeal for want of prosecution, and shall issue a certified copy thereof to the clerk of the district court as and for the mandate. In no case shall the appellant be entitled to remedy his default after the same shall have been dismissed under this rule, unless by order of this court. The dismissal of an appeal shall not limit the authority of this court, in an appropriate case, to take disciplinary action against defaulting counsel.

Rule 46(a). Legal assistance to indigents by law students.

An eligible law student with the written consent of an indigent and his attorney of record may appear in this court on behalf of that indigent in any case. An eligible law student with the written consent of the United States Attorney or his authorized representative may also appear in this court on behalf of the United States in any case. An eligible law student with the written consent of the State Attorney General or his authorized representative may also appear in this court on behalf of that state in any case. In each case, the written consent shall be filed with the clerk.

An eligible law student may assist in the preparation of briefs and other documents to be filed in this court, but such briefs or documents must be signed by the attorney of record. He may also participate in oral argument with leave of the court, but only in the presence of the attorney of record. The attorney of record shall assume personal professional responsibility for the law student's work and for supervising the quality of his work. He should be familiar with the case and prepared to supplement or correct any written or oral statement made by the student.

In order to make an appearance pursuant to this rule, the law student must:

1. Be duly enrolled in a law school approved by the American Bar Association;
2. Have completed legal studies amounting to at least four (4) semesters, or the equivalent if the school is on some basis other than a semester basis;
3. Be certified by the dean of his law school as being of good character and competent legal ability which certification shall be filed with the clerk. This certification may be withdrawn by the dean at any time by mailing notice to the clerk or by termination by this court without notice of hearing and without any showing of cause;
4. Be introduced to the court by an attorney admitted to practice before this court;
5. Neither ask for nor receive any compensation or remuneration of any kind for his services from the person on whose behalf he renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, a state, or the United States from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require;
6. Certify in writing that he or she has read and is familiar with the Code of Professional Responsibility or Rules of Professional Conduct in force in the state in which the student's law school is located. (Amended October 3, 1984.)

Rule 46(b). Attorney fees and expenses under the equal access to justice act.

1. This rule implements the provisions of the Equal Access to Justice Act, Public Law 96-481, 94 Stat. 2325 (1980).

2. Contents of Application. An application to this court for an award of fees and expenses pursuant to 28 U.S.C. § 2412(d)(1)(B) shall identify the appli-

cant and the proceeding for which an award is sought. The application shall show the nature and extent of services rendered in this court, that the applicant has prevailed, and shall identify the position of the United States government or an agency thereof in the proceeding that the applicant alleges was not substantially justified.

3. Petitions for Leave to Appeal.

i. A petition for leave to appeal pursuant to 5 U.S.C. § 504(c)(2) shall be filed with the clerk of the court of appeals within thirty (30) days after the entry of the agency's order, with proof of service on all other parties to the agency's proceedings.

ii. The petition shall contain a copy of the order to be reviewed and any findings of fact, conclusions of law and opinion relating thereto, a statement of the facts necessary to an understanding of the petition and a memorandum showing why the petition for permission to appeal should be granted. An answer may be filed within thirty (30) days after service of the petition, unless otherwise directed by the court. The application and any answer shall be submitted without further briefing and oral argument unless otherwise ordered.

iii. All papers may be typewritten. An original and three (3) copies shall be filed with the court.

iv. Within ten (10) days after the entry of an order granting permission to appeal, the appellant shall pay to the clerk of the court of appeals the docket fee prescribed by the Judicial Conference of the United States. Upon receipt of the payment, the clerk shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rule 17 of the Federal Rules of Appellate Procedure. A notice of appeal need not be filed.

4. Appeals/Petitions to Review. Appeals and petitions to review otherwise contemplated by the Equal Access to Justice Act may be filed pursuant to the applicable statutes and rules of court.

Rule 47. Disclosure of corporate affiliations and financial interest.

(a) All parties to a civil or bankruptcy case and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is also required.

(b) Whenever a corporation which is a party to an appeal, or to a motion or other proceedings relating to an appeal, is a subsidiary of any publicly owned corporation not named in the appeal, counsel for the corporation which is a party shall advise the clerk in writing of the identity of the parent corporation or affiliate and the relationship between it and the corporation which is a party to the appeal.

(c) Whenever, by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, a publicly owned corporation, not a party to the appeal, has a financial interest in the outcome of litigation in which another person is a party to an appeal, or to a motion or other proceedings relating to an appeal, counsel for the person who is a party shall advise the clerk in writing of the identity of the publicly owned corporation and the nature of its financial interest in the outcome of the litigation.

(d) Whenever a trade association is a party to an appeal, or an intervenor it shall be the responsibility of counsel for the trade association to identify each publicly owned member of the association in conformity with section (a) through (c) above.

(e) The disclosure statement shall be made on a form provided by the clerk and filed at the inception of the case in the court of appeals and shall be amended when necessary to maintain its current accuracy.

FORMS

Form 1. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the .... District of ....

A. B., PLAINTIFF *v.* C. D., DEFENDANT	File Number ....

Notice of Appeal

Notice is hereby given that C. D., defendant above named, hereby appeals to the United States Court of Appeals for the .... Circuit (from the final judgment) (from the order (describing it)) entered in this action on the .... day of ...., 19....

(S) ....
....
(Address)
Attorney for C. D.

Form 2. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A DECISION OF THE UNITED STATES TAX COURT

UNITED STATES TAX COURT
WASHINGTON, D.C.

A. B., PETITIONER *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT	Docket No.....

Notice of Appeal

Notice is hereby given that A. B. hereby appeals to the United States Court of Appeals for the .... Circuit from [that part of] the decision of this court entered in the above captioned proceeding on the ...... day of ...., 19....
[relating to ....].

(S) ....
....
(Address)

Form 3. PETITION FOR REVIEW OF ORDER OF AN AGENCY, BOARD, COMMISSION OR OFFICER

United States Court of Appeals for the .... Circuit

A. B., PETITIONER
v.
XYZ COMMISSION, RESPONDENT

A. B. hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on . . . ., 19. . . ..

. . . .,
Attorney for Petitioner.
Address:

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

____

v.

____

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, ______________________________ being first duly sworn, depose and say that I am the ______________, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

ASSETS	EMPLOYMENT	Are you now employed? ☐ Yes ☐ No ☐ Am Self Employed Name and address of employer: ______________________ IF YES, how much do you earn per month? $____________	IF NO, give month and year of last employment How much did you earn per month $____________	
		If married is your Spouse employed? ☐ Yes ☐ No IF YES, how much does your Spouse earn per month $____________	If a minor under age 21, what is your Parents or Guardian's approximate monthly income $____________	
	OTHER INCOME	Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or annuity payments, or other sources? ☐ Yes ☐ No IF YES, GIVE THE AMOUNT RECEIVED & IDENTIFY THE SOURCES	RECEIVED $ ______ ______ ______	SOURCES ____________ ____________ ____________
	CASH	Have you any cash on hand or money in savings or checking account ☐ Yes ☐ No IF YES, state total amount $____________		
	PROPERTY	Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? ☐ Yes ☐ No IF YES, GIVE VALUE AND DESCRIBE IT	VALUE $ ______ ______ ______ ______	DESCRIPTION ____________ ____________ ____________ ____________

OBLIGATIONS & DEBTS

DEPENDENTS

MARITAL STATUS
☐ SINGLE
☐ MARRIED
☐ WIDOWED
☐ SEPARATED OR DIVORCED

Total No. of Dependents ☐

List persons you actually support and your relationship to them
____
____
____
____

DEBTS & MONTHLY BILLS (LIST ALL CREDITORS, INCLUDING BANKS, LOAN COMPANIES, CHARGE ACCOUNTS, ETC.)

	Creditors	Total Debt	Monthly Payt.
APARTMENT OR HOME:			
	____________	$______	$______
	____________	$______	$______
	____________	$______	$______
	____________	$______	$______

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

____

Sworn and subscribed before me
this ______ day of ____________, 1982.

____
NOTARY PUBLIC

Form 5. Disclosure of Corporate Affiliations and Financial Interest

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

)
)
)
)
v.) No. . . . .
)
)
)
)

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Local Rule 17, ... makes the following disclosure:
(Name of Party)

1. Is said party a subsidiary or affiliate of a publicly owned corporation?
(Check One) ☐ Yes ☐ No

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?
(Check One) ☐ Yes ☐ No

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

. . . .
(Signature of Counsel) (Date)

United States Circuit Court of Appeals, Fourth Circuit

No. ________________ *Term, 19*___

____

____

vs.

____

____

The Clerk will enter my appearance as counsel for the ________________

____

Area Code & Telephone No. ________________

☞NOTE—Must be signed by an Attorney and Counselor admitted to practice in the Supreme Court of the United States, any United States Court of Appeals, any United States District Court, or the highest Court of the State to which he belongs. Individual and not firm names must be signed.

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Adopted effective April 1, 1984.

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Editor's Note. — Each internal operating procedure follows the numbering scheme of the Federal Rules of Appellate Procedure to which it pertains and there has been an attempt by the court not to repeat any information that can be found in the body of any rule. Whenever possible, information concerning practices and procedures of the court are set forth in the published internal operating procedures of the court rather than in the local rules. The court has adopted a local rule only in those circumstances where the rule establishes specific affirmative obligations on the parties proceeding before the court, delegates additional authority to the clerk or creates certain options which the Federal Rules of Appellate Procedure indicate can only be exercised by creation of a local rule.

I.O.P. 3.1. Filing and docket fees.

Upon filing a notice of appeal appellant shall pay the clerk of the district court a fee of $70.00, which includes a $5.00 filing fee for the notice of appeal, and a $65.00 fee for docketing the appeal in this court.

I.O.P. 4.1. Appeal from magistrate decisions.

Parties in a district court civil proceeding may consent to the conduct and disposition of their case by a United States Magistrate. An appeal from a magistrate's decision in such cases will be to the court of appeals unless the parties further consent to appeal to a district judge. A district judge's decision on appeal from a magistrate's decision may be reviewed by the court of appeals upon a petition for permission to appeal. Such petitions are treated similarly to FRAP 6 petitions, observing the same time periods and format.

I.O.P. 5.1. Interlocutory orders.

Certain interlocutory orders may be appealed as a matter of right pursuant to 28 U.S.C. § 1292(a). These include orders concerning injunctions (but not temporary restraining orders), and certain orders involving receiverships, admiralty, and patent proceedings. Filing an appeal from these orders follows the same procedure as any other civil appeal.

Other interlocutory orders may be reviewed by the court of appeals at its discretion, if a district judge includes in the interlocutory order the statement prescribed by 28 U.S.C. § 1292(b). Counsel must file an original and three copies of the petition for permission to appeal with the clerk of the court of appeals.

The court of appeals will initially enter a case upon its miscellaneous docket; a docket fee shall not be required unless the petition is granted. Upon granting the petition, the court of appeals will notify the district court by copy of the order and transfer the case to the regular docket upon payment of the appropriate fees to the district court. A notice of appeal need not be filed.

I.O.P. 6.1. Bankruptcy appeals.

The Fourth Circuit has not established panels of three bankruptcy judges to hear appeals from bankruptcy courts pursuant to 28 U.S.C. § 160. Thus, ordinarily appeals from a bankruptcy court lie to the district court. With leave of the district court, appeals may be taken from interlocutory orders and decrees. The Fourth Circuit has jurisdiction to hear appeals from final orders in bankruptcy cases from either the district court or directly from the bankruptcy court if the parties agree to proceed directly to the court of appeals.

I.O.P. 8.1. Stay or injunction pending appeal.

Filing a notice of appeal does not automatically stay the operation of the judgment, order or decision of which review is sought. An application for temporary relief pending appeal should be made first to the district court. Any subsequent motion to the court of appeals should include copies of all previous applications for relief and their outcome. If application to the district court for temporary relief pending appeal is not practicable, counsel must make a specific showing of the reasons application was not made to the district court in the first instance. If any party deems that parts of the record or other materials are essential to a fair presentation of the issues regarding a motion, copies of these papers must be attached to each copy of his motion. The motion will usually be considered by a panel of the court consisting of two judges; although, if time is of the essence, a single judge resident in the state of the trial court proceeding may determine the motion or grant temporary relief until the matter can be considered by the court. The selection of motion panels is similar to the process set forth in I.O.P. 34.2 for hearing panels. An order granting a stay or injunction pending appeal remains in effect until issuance of the mandate or further order of the court and may be conditioned upon the filing of a supersedeas bond in the district court.

I.O.P. 9.1. Release prior to judgment of conviction.

A criminal defendant may be released in accordance with the conditions set by the district court prior to judgment of conviction. If the district court refuses to release the prisoner, or sets conditions for release that cannot be met, the order is appealable as a matter of right and will be given prompt consideration by the court of appeals. Counsel should submit memoranda in support of their position on appeal. The appeal is usually decided without oral argument upon the materials presented by the parties. A motion for release pending determination of the appeal may be filed. The motion may be acted upon by a single judge, but the appeal itself must be submitted to a three judge panel for decision.

I.O.P. 9.2. Release after conviction and notice of appeal.

Application to set bail or for a reduction of bail pending appeal must be made first to the district court. Once the district court has ruled on the motion, the appellant may renew the motion for release, or for a modification of the conditions of release, before the court of appeals without noting an additional appeal. A copy of the district court statement of reasons should accompany the motion. The motion will be submitted to a single circuit judge whose residence is in the state where the appellant was convicted.

I.O.P. 9.3. Recalcitrant witnesses.

When an appeal arises from the incarceration of a witness who refuses to testify or produce evidence in any court or grand jury proceeding, the court of appeals is required by statute, 28 U.S.C. § 1826, to decide the appeal within 30 days of the filing of the notice of appeal. Therefore, counsel should immediately contact the clerk's office regarding all such witness contempt matters so that the appeal may be expedited for resolution within the statutory guidelines.

I.O.P. 10.1. Records on appeal.

The preparation and transmittal of the record on appeal is the obligation of the clerk of the lower court, board or agency and any questions concerning form or content should be addressed to the trial forum in the first instance. A record on appeal consists of a specific number of volumes of pleadings, transcripts, and exhibits. Parties should be sure that everything relevant to the issues on appeal is included initially in the record on appeal in order to obviate motions to supplement the record. The record is transmitted to the appellate court as soon as it is complete. The record is considered filed upon receipt by the court of appeals and notice of such filing is sent by the clerk to all parties.

I.O.P. 10.2. Transcripts.

(a) Responsibilities and designation.

The appellant has the duty of ordering transcript of all parts of the proceedings material to the issues to be raised on appeal whether favorable or unfavorable to appellant's position. Transcript purchase order forms are provided to appellant by the clerk of the district court at the time the notice of appeal is filed. Appellant should complete the form and distribute the appropriate parts of the form to the court reporter, the clerk of the district court, and the appellee.

Before a transcript is considered properly ordered, the appellant must make appropriate financial arrangements with the court reporter for either immediate payment in full or in other form acceptable to the court reporter, payment pursuant to the Criminal Justice Act, or at government expense pursuant to 28 U.S.C. § 753(f).

In cross appeals each party must order those parts of the transcript pertinent to the issues of such appeals. The parties are encouraged to agree upon those parts of the transcript jointly needed and to apportion the cost, with additional portions being ordered and paid for by the party considering them essential to that party's appeal.

(b) Monitoring and receipt by clerk.

Failure to order timely a transcript will subject an appeal to dismissal for want of prosecution by the clerk pursuant to local rule. The clerk's office is charged with monitoring the status of transcripts pending with court reporters.

(c) Sanctions.

The Circuit Judicial Council has approved a resolution of the Judicial Conference of the U.S. which mandates sanctions for the late delivery of transcripts. For transcripts not delivered within 60 days of the date ordered and payment received therefor, the reporter may charge only 90 percent of the prescribed fee; for a transcript not delivered within 90 days the reporter may charge only 80 percent of the prescribed fee. Three districts within the circuit, the District of South Carolina, the Eastern District of North Carolina, and the Southern District of West Virginia, prescribe shorter periods of time for the delivery of transcripts without penalty. For transcripts not delivered within 30 days of the date ordered and payment received therefor, the reporter may charge only 90 percent of the prescribed fee; for a transcript not delivered within 60 days the reporter may charge only 80 percent of the prescribed fee.

(d) Statement in lieu of transcript.

The parties may prepare and sign a statement of the case in lieu of the transcript or the entire record on appeal. The use of a statement in lieu of a transcript of a hearing substantially accelerates the appellate process by removing the largest single cause for delay in the court of appeals — preparation of a transcript. The statement should contain a description of the essential facts averred and proved or sought to be proved and a summary of pertinent testimony.

I.O.P. 10.3. Sealed records.

Material contained in the record subject to a protective order remains subject to that order on appeal unless modified or amended by the court of appeals. Copies of materials submitted to the court of appeals is not subject to the protective order entered by the trial court and will be sealed only upon application to the court of appeals. Material subject to a protective order shall be available to counsel only if permitted by that order.

I.O.P. 10.4. Supplemental records, modification or correction.

Disputes concerning the accuracy or composition of the record on appeal should be resolved in the trial court in the first instance, although the court of appeals has the power, either on motion or of its own accord, to require that the record be corrected or supplemented. It is unnecessary to seek permission of the court of appeals to supplement the record and the record may be supplemented by the parties by stipulation or by order of the district court at any time during the appellate process.

I.O.P. 11.1. Exhibits.

Counsel should be aware that certain portions of the record will not be transmitted to the court of appeals as part of the record. Only documentary exhibits are routinely included in the record, and then only if they are not heavy or bulky. If bulky documents and physical exhibits are required by a party for oral argument, the party must make advance arrangements with the clerks of both courts for their transportation and receipt. Such arrangements are best made after the completion of the briefing schedule on appeal and receipt of notice of oral argument.

I.O.P. 11.2. Access of counsel to original record.

Counsel desiring to use the record on appeal in preparing their case should make arrangements with the clerk of the district court before the record is transmitted to the court of appeals. It is possible that the record may be temporarily retained in the district court. After transmission to the court of appeals the record may be withdrawn. Upon proper application the record may be returned to the trial court or the nearest district court clerk's office for counsel's review. Law professors representing indigents by court appointment may request that the record be sent to the law school for their review.

I.O.P. 12.1. Organization of the court's docket.

The docket of the court is organized into five separate divisions:

a. Civil and bankruptcy appeals, agency cases, and original actions are designated as the 1000 docket series;

b. Direct criminal appeals are designated as the 5000 docket series;

c. Prisoner appeals are designated as the 6000 docket series;

d. Miscellaneous cases, such as petitions for leave to appeal and pro se petitions for writs of mandamus, are designated as the 8000 docket series;

e. Complaints of judicial misconduct or disability are designated as the 9000 docket series.

I.O.P. 12.2. Appeals by aggrieved non-parties in the lower court.

If the appellant was not a party to the lower court proceeding, the appeal shall be styled In re ____________, Appellant and the title of the action in the district court shall also be given.

I.O.P. 12.3. Joint appeals/cross appeals and consolidations.

For the purpose of identifying consolidated appeals and cross appeals, the earliest docketed appeal will be designated the lead case and identified by a "L" following its docket number. The parties should designate lead counsel for each side and communicate lead counsel's identity in writing to the clerk within 10 days of the consolidation order. Although most consolidations will be on the court's own motion, a party is not precluded from filing a request.

I.O.P. 12.4. Expedition of appeals.

The court on its own motion or on motion of the parties may expedite an appeal for briefing and oral argument. Any motion to expedite should state clearly the reasons supporting expedition, the ability of the parties to present the appeal on the existing record, and the need for oral argument. If an appeal is expedited the record will be transmitted to the Fourth Circuit forthwith and any outstanding uncompleted transcript will be transmitted upon completion as a supplement to the record.

I.O.P. 12.5. Abeyance.

In the interest of docket control the court may, either on its own motion or upon request, place a case in abeyance pending disposition of matters before this court or other courts which may affect the ultimate resolution of an appeal. During the period of time a case is held is [in] abeyance the appeal remains on the docket but nothing is done to advance the case to maturity and resolution. If a case is held is [in] abeyance for cases other than a Fourth Circuit case, the parties will be required to make periodic status reports.

I.O.P. 12.6. Intervention.

A party who appeared as an intervenor in a lower court proceeding shall be considered a party to the appeal upon filing a notice of appearance. Otherwise, a motion for leave to intervene must be filed with the court of appeals. Any notice of appearance or motion to intervene should indicate the side upon which the movant proposes to intervene. The provisions of FRAP 15(d) govern intervention in appeals from administrative agencies. Intervenors are required to join in the brief for the side which they support unless leave to file a separate brief is granted by the court.

I.O.P. 15.1. NLRB applications for enforcement.

In an application for enforcement by the National Labor Relations Board under FRAP 15(b), the private respondent proceeds as if it were the moving party. The respondent is obliged to file the opening brief and the board responds. Oral argument follows the same pattern. The purpose of the local rule is to narrow the issues presented for review and accelerate the review process.

I.O.P. 21.1. Petitions for mandamus or prohibition.

An application for an extraordinary writ pursuant to 28 U.S.C. § 1651 is originated by filing an original and three copies of the petition with the clerk of the court of appeals. Proof of service on the respondent judge or judges and on all parties in the trial court is required. The clerk will not docket the petition until the prescribed docket fee of $65.00 to the clerk of the court of appeals has been paid or the petitioner submits a properly executed application for leave to proceed in forma pauperis. Strict compliance with the requirements of FRAP 21 is required even from pro se litigants.

After docketing, the clerk shall submit the application to a three-judge panel. If the court believes the writ should not be granted, it will deny the petition without calling for an answer. Otherwise the court directs the clerk to request an answer. All parties to the action in the trial court other than petitioner who oppose the relief requested are deemed respondents and shall be responsible for filing a requested answer within the time fixed by the clerk. After an answer has been filed, the court ordinarily will decide the petition on its merits on the materials submitted without oral argument. Occasionally, however, briefs may be requested and the matter set for oral argument.

I.O.P. 22.1. Applications for certificates of probable cause.

All applications for certificates of probable cause shall be accompanied by memoranda or informal brief pursuant to local Rule 34(b), regardless of whether the petitioner is represented by counsel. If the court grants a certificate of probable cause, it may thereafter affirm, reverse or remand without further briefing or direct full briefing and oral argument. A panel of the court may grant a certificate of probable cause and summarily dispose of the case on the merits without further proceedings.

I.O.P. 22.2. Death penalty cases.

Once a notice of appeal has been filed in a case involving a sentence of death where an execution date has been set, a panel of three judges will be promptly identified for consideration of all matters related to the case. At least one member of the panel selected will be from the state where petitioner's conviction arose, unless such judge or judges are unavailable. The position of coordinator of case information in death penalty cases has been established in the Clerk's Office of the Court of Appeals for the purpose of establishing personal liaison with district court personnel and counsel to aid in the expeditious treatment of appeals involving a sentence of death. An expedited briefing schedule will be established when necessary to allow the court the opportunity to review all issues presented. (Amended June 1, 1984; amended eff. February 6, 1985.)

I.O.P. 22.3. Petitions for rehearing in death penalty cases.

All death penalty cases. Once the court's mandate has issued in a death penalty case, any petition for rehearing (with or without a suggestion for rehearing in banc) should be accompanied by a motion to recall the mandate and a motion to stay the execution.

Counsel should be aware that the process for distributing materials by the clerk's office ordinarily requires a minimum of three days for all members of the court to receive a petition. Generally, the court will not enter a stay of execution solely to allow for additional time for counsel to prepare, or for the court to consider, a petition for rehearing, with or without a suggestion for rehearing in banc. Consequently, counsel should take all possible steps to assure that any such petition is filed sufficiently in advance of the scheduled execution date to allow it to be considered by the court. Counsel should notify the clerk's office promptly of their intention to file a petition for rehearing so that arrangements can be made in advance for the most expeditious consideration of the matter by the court.

Emergency petitions. In extraordinary circumstances, when the petition cannot be filed earlier than three days before a scheduled execution date, the clerk's office will endeavor to inform the members of the panel that issued the court's decsion of the filing of a petition for rehearing (with or without a suggestion for rehearing in banc) within a shorter period of time. At the direction of a panel member, similar efforts will be made to inform the full court of the matter. The clerk's office will give notice to counsel by telephone of the court's decision on such petitions. (Added eff. February 6, 1985.)

I.O.P. 25.1. Paper size, number of copies, attachments.

a. Paper size — The Judicial Conference of the United States has adopted 8 1/2 x 11 inch letter size paper as the standard for use throughout the federal judiciary. All documents and other papers submitted to this court, except briefs and appendices produced by the standard typographic process in accordance with FRAP 32(a), must conform to this standard.

b. Number of copies, attachments — Unless otherwise provided by rule, all papers except briefs and appendices submitted to the Fourth Circuit for filing and for consideration by the court must be in the form of an original paper and three copies. Any attachments to motions which are necessary to an understanding of the matters set forth in the motion must be submitted with three copies and conform to the standard paper size unless advance permission is sought to submit oversized materials.

I.O.P. 25.2. Filing papers, certificate of service.

a. Filing papers — Papers except briefs and appendices are not timely filed unless actually received by the clerk's office within the time fixed for filing. Papers are deemed filed upon receipt by the clerk's office and papers may be presented either in person or by mail. The three-day mailing period permitted by FRAP 26(c) does not apply to responses requested by the court or clerk by letter wherein a response date is set forth in the request. Although an opposing party may respond to any motion in which a response is permitted under the rules, it is not necessary to do so unless and until directed by the court.

b. Certificate of Service — Service on a party represented by counsel must be on all counsel of record.

I.O.P. 27.1. Motions.

All motions should be filed with the clerk and comply with FRAP 27(d) and 32(b). They may be typewritten and three copies must be filed with the original. Counsel should always review carefully the specific rule which authorizes relief to ascertain the requirements and any motion should contain or be accompanied by any supporting documents required by a specific rule. If a motion is supported by attachments, these materials should also be served and filed with each copy of the motion. The parties should not make requests for procedural and substantive relief in a single motion, but should make each request in a separate motion.

I.O.P. 27.2. Responses.

Any party may file a response to a motion within seven days after service of the motion, but a party need not respond to a motion until requested to do so by the court. If the court acts upon a motion without a response, any party adversely affected by such action may by application to the court request reconsideration, vacation or modification of the court's action.

I.O.P. 27.3. Orders.

It is unnecessary for counsel to submit proposed orders with motions. The court routinely prepares its own orders upon disposition of a motion.

I.O.P. 27.4. Single judges and emergency motions.

A single judge of the Fourth Circuit may entertain and decide motions, except a single judge may not dismiss or otherwise ultimately determine an appeal. Presentation of certain emergency motions can be by application to a single judge at his resident chambers, but it is a matter of an individual judge's discretion as to whether he will entertain an emergency motion as a single judge. Applications to a single judge should ordinarily be made to a circuit judge who is resident in the state where the application originated. If time permits, counsel are urged to follow the preferred procedure of presenting all motions to the clerk for presentation to the court. Counsel should contact the clerk's office before making application to a single judge and copies of all papers presented to the judge should also be presented to the clerk for filing. The action of a single judge may be reviewed by the court or a panel thereof.

Motions filed with the clerk may be submitted and decided by a single judge or by a two or three judge panel of the court. When deemed advisable, motions may be submitted to the full court for decision.

I.O.P. 27.5. Motions for summary dispositions.

Motions for summary disposition or reversal are reserved for extraordinary cases only and should not be filed routinely. Counsel contemplating filing a motion to dispose summarily of an appeal should carefully consider whether the issues raised on appeal are in fact manifestly unsubstantial and appropriate for disposition by motion. Motions for summary affirmance or reversal are seldom granted.

Motions for summary disposition should be made only after briefs are filed. If such motions are submitted before the completion of the briefing schedule, the court will defer action on the motion until the case is mature for full consideration.

Motions to dismiss based upon the ground that the appeal is not within the jurisdiction of the court or for other procedural grounds may be filed anytime. The court may also sua sponte summarily dispose of any appeal anytime.

I.O.P. 28.1. Length of briefs.

The Fourth Circuit encourages short, concise briefs and under no circumstances may a brief exceed the limits provided by FRAP 28(g) without the court's advance permission.

A motion for permission to submit a longer brief must be made to the court of appeals at least ten days prior to the due date of the brief and must be supported by a statement of reasons. These motions are not favored and will be granted only for exceptional reasons. The use of lengthy single-spaced footnotes or narrow margins to circumvent page limits should be avoided.

I.O.P. 28.2. Joint appeals/cross appeals and consolidations.

Where multiple parties are directed to file a consolidated brief, the joint brief shall not exceed 50 pages in length. Counsel on the same side of the case should confer and agree upon a means for assuring that the positions of all parties are addressed within the page limits allowed and that each council will have an opportunity to review and approve the consolidated brief before it is filed.

Motions to file separate briefs are not favored by the Court and are granted only upon a particularized showing of good cause, such as, but not limited to, cases in which the interests of the parties are adverse. Generally unacceptable grounds for requests to file separate briefs include representations that the issues presented require a brief in excess of 50 pages (appropriately addressed by a motion to exceed page limit), that counsel cannot coordinate their efforts due to different geographical locations, or that the participation of separate counsel in the proceedings below entitles each party to separate briefs on appeal.

If a motion to file separate briefs is granted, the number of pages allowed for such briefs may be limited by the Court. The parties shall continue to share the time allowed for oral argument. (Amended October 3, 1984.)

I.O.P. 28.3. Citation of additional authorities.

Counsel may, without leave of Court, present a letter drawing the Court's attention to supplemental authorities under Rule 28(j). An original and three copies of the letter should be filed with the clerk and a copy of the letter should be mailed to all counsel of record. No argument should be made in the letter. The Court may grant leave for or direct the filing of additional memoranda, which may include additional argument, before, during or after oral argument. (Amended October 3, 1984.)

I.O.P. 30.1. Appendix contents, number of copies.

Although there is no limit on the length of the appendix, it is unnecessary to include everything in the appendix. The appendix should contain only those parts of the record vital to the understanding of the basic issues on appeal. The use of a selectively abridged record allows the judges to refer easily to relevant parts of the record, and saves the parties the considerable expense of reproducing the entire record.

Pursuant to the authority granted by FRAP 30(a), the court requires that only six copies of the appendix must be filed with appellant's opening brief and a copy served on counsel for each party separately represented. Appointed counsel may file five copies and any party proceeding in forma pauperis who is not represented by court-appointed counsel may file four copies. If the court allows a deferred appendix the parties routinely file four page-proof copies of the brief in lieu of the requisite number of copies. After the deferred appendix is filed, the parties must replace their page-proof copies with the requisite number of copies of their final brief which must contain proper references to the appendix.

I.O.P. 30.2. Responsibility of parties.

Notwithstanding that FRAP 30 provides that the appellant shall prepare and file the appendix, the court considers the coordination of preparing the appendix to be the responsibility of both sides. The failure of a side to designate does not absolve the other side from the responsibility.

Except under the most extraordinary circumstances, supplementary appendices will not be accepted. If the appellant omits from the appendix the portions designated by the appellee, the appellant will be required to file a corrected appendix incorporating such material, and to bear the cost regardless of the outcome of the appeal.

I.O.P. 30.3. Dispensing with appendix.

Motions to proceed on the original record pursuant to FRAP 30(f) are carefully reviewed in the Fourth Cricuit and are not usually granted unless the appellant is proceeding in forma pauperis, the record is short or the appeal is expedited. Even if the motion is granted, counsel must include an abbreviated appendix consisting of:

i. Pertinent district court docket entries,
ii. Indictment or complaint,
iii. Judgment or order being appealed,
iv. Notice of appeal,
v. Any crucial portions of the transcript of proceedings referred to in appellant's brief,

vi. A copy of the order granting leave to proceed on the original record. The requisite number of copies of the abbreviated appendix as set forth in I.O.P. 30.1 must be filed with the brief, but it may be included as part of the brief rather than being reproduced separately.

I.O.P. 31.1. Briefing orders — Civil and criminal cases.

A formal briefing schedule shall be sent to the parties upon receipt of the record, including all relevant parts of the transcript. Thus, the time for filing briefs is controlled by the briefing order and not the receipt of the record as provided in FRAP 30(a).

I.O.P. 31.2. Filing and service — Civil and criminal cases.

Briefs may be mailed and are deemed filed on the date of mailing with the U.S. Postal Service. If a courier service is utilized, briefs must be received in the clerk's office on the due date. Filing must be within the time allowed by the briefing order. Extensions will be granted only when extraordinary circumstances exist. A motion for an extension of time to file a brief must be filed well in advance of the date the brief is due and must set forth the additional time requested and the reasons for the request. The court discourages these motions and may deny the motion entirely or grant a lesser period of time than the time requested.

I.O.P. 31.3. Number of copies — Civil and criminal cases.

Each party must file twelve copies of the brief with the clerk and serve two copies on counsel for each party separately represented. Appointed counsel may file six copies and any party proceeding in forma pauperis who is not represented by court-appointed counsel may file four copies, with service of one copy on counsel for each party separately represented. If an in banc hearing or rehearing in banc is scheduled, additional copies of briefs may be requested.

I.O.P. 32.1. Format.

Briefs may be typewritten, printed or reproduced by any other satisfactory process. Photocopies are acceptable. Attorneys appointed under the Criminal Justice Act should be aware that the expense of printing briefs is not reimbursable but the cost of mimeographing or photocopying briefs is reimbursable.

I.O.P. 32.2. Telephone number of counsel.

In order to facilitate the orderly and prompt processing of briefs by the clerk's office, counsel should indicate their telephone numbers beneath the names and addresses on the brief covers.

I.O.P. 32.3. Failure to comply.

Submission of an illegible brief or one not complying with the court's rules or standards will result in the brief being returned to counsel for correction and resubmission. If the resubmission is out of time, a motion to file out of time must accompany the brief upon resubmission.

I.O.P. 34.1. Court sessions and notification to counsel.

The court sits in Richmond, Virginia for five consecutive days each month from October through June for its regular court terms. Court sessions are usually the first full week of each month, but adjustments are made because of holidays and elections, and special sessions may be scheduled at any time, anywhere in the circuit. Panels of the court also regularly sit the first full week of a scheduled month in Baltimore, Maryland, usually at least 4 times per year. On specified days during the summer months, panels sit in various cities throughout the circuit.

The court initially hears and decides cases in panels consisting of three judges with the chief judge or most senior active judge presiding. Each panel regularly hears oral argument in four cases each day during court week; additional cases are added as required. Unless instructed otherwise, registration of the attorneys who will argue begins at 8:30 a.m. and the court convenes at 9:30 a.m. Counsel must check in with the clerk's office by 9:00 a.m. for courtroom assignments and order of appearance, and the allocation of oral argument time. Counsel who have not been admitted to practice before the court should inform the clerk at this time.

Preparation for the argument calendar begins in the clerk's office approximately two months prior to argument. Therefore, if a case is approaching maturity and an attorney anticipates a possible conflict, the clerk's office should be notified in writing at the earliest possible moment. Once a case has been scheduled for argument, it will be removed from the argument calendar only for extreme unforeseeable problems. Excusal from an established oral argument date is not granted because of a prior professional commitment. Although a case will not be removed from the calendar because of a scheduling conflict by counsel after the notification of oral argument has been issued, the court may direct another lawyer from the same firm to argue the appeal if counsel of record cannot be present.

I.O.P. 34.2. Calendar assignments and panel composition.

The clerk of court maintains a list of mature cases available for oral argument and on a monthly basis merges those cases with a list of three judge panels provided by a computer program designed to achieve total random selection.

The composition of each panel usually changes each day during court week except on those occasions where only one panel is sitting in a given geographical location. Every effort is made to assign cases for oral argument to judges who have had previous involvement with the case on appeal by way of a preargument motion, but there is no guarantee that any of the judges who have previously been involved with an appeal will be assigned to the hearing panel. The varied assignment of judges to panels and the independent assignment of varied cases to panels is designed to assure the opportunity for each judge to sit with all other judges an equal number of times, and that both the appearance and the fact of presentation of particular cases to particular judges is avoided.

I.O.P. 34.3. Argument time.

Briefs for the cases assigned to a hearing panel are distributed by the clerk to the judges on a hearing panel at the time the hearing panel assignments are made. The members of the court hearing oral argument will have read the briefs before the hearing and therefore will be familiar with the case. In oral argument, counsel should emphasize the dispositive issues.

Since the appellant is allowed to open and close the argument, he should indicate at registration before oral argument how much time he wants to reserve for rebuttal. It is recommended that no more than two attorneys argue per side. Each side is allowed 30 minutes, even in consolidated cases, but counsel may not need the full time allotted. If counsel believes that more than 30 minutes are needed, a written motion for additional time must be submitted well in advance of the hearing date. Such motions are discouraged by the court and are seldom granted. The court may sua sponte extend the allotted time during the argument or it may terminate the argument whenever in its judgment further argument is unnecessary.

I.O.P. 34.4. Disposition without oral argument.

All cases are subject to evaluation and review before placement on a calendar for hearing. Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs.

A decision against oral argument must be unanimous, and if a case is decided without oral argument the decision on the merits must be unanimous also. Whenever at least one member of the review panel determines that oral argument would be of assistance, the panel notifies the clerk who places the case on the oral argument calendar. If the panel reviewing an informal brief submitted by an indigent pro se litigant determines that further briefing and possible oral argument would be of assistance, counsel will be appointed and directed to file additional formal briefs. In any appeal that has been informally briefed, the court may direct that additional briefs be filed prior to oral argument.

I.O.P. 34.5. Motion to submit on briefs.

As soon as possible upon completion of the briefing schedule and prior to notification of oral argument, any party may file a motion to submit the case on the briefs without the necessity of oral argument. Such motions are not granted as a matter of course. A motion to submit on briefs should not be used to alleviate a scheduling conflict after the notification of oral argument has been issued.

I.O.P. 34.6. Informal briefs.

Local Rule 34(b) has established a procedure for the filing of "informal briefs" in certain cases. The informal brief may be submitted on a form provided by the clerk and should provide specific information about the case in response to questions appearing on the form. The parties need not limit their briefs solely to the form. It is not necessary to cite cases in an informal brief. An additional supporting memorandum may be submitted if a party deems it necessary in order to address adequately the issues raised. Two copies of the brief and memorandum, if any, must be filed with the court and a copy mailed to opposing counsel.

Once an informal briefing schedule has been established the parties may file a formal brief only with the permission of the court. The court initially reviews cases that are informally briefed under its procedures set forth in local rule 34(a) pertaining to pre-argument review. The court does not limit its review to the issues raised in informal briefs, but reviews the entire record on appeal for possible meritorious issues.

I.O.P. 35.1. Additional copies of briefs and appendix for in banc hearing or rehearing.

The Court's order granting hearing or rehearing in banc may require the parties to file additional copies of the briefs and appendix. Each party will bear the initial cost of additional copies of its own briefs. The party that requested the hearing or rehearing in banc will bear the initial cost of filing additional copies of the appendix. In the event that cross petitions for hearing or rehearing in banc are granted, the parties will share equally the initial cost of preparing additional copies of the appendix. (Amended eff. December 6, 1984.)

I.O.P. 36.1. Opinion preparation assignments.

The custom of the Fourth Circuit is to reserve judgment at the conclusion of oral argument. A conference of the panel is held promptly after oral argument, usually immediately after the presentation of the case. Although a tentative decision may be reached at this conference, additional conferences are sometimes necessary. Opinion assignments are made by the chief judge on the basis of recommendations from the presiding judge of each panel on which the chief judge did not sit.

I.O.P. 36.2. Circulation of opinions in argued cases and announcement of decision.

Although one judge writes the opinion, every panel member is equally involved in the process of decision. When a proposed opinion in an argued case is prepared and submitted to other panel members copies are provided to the nonsitting judges including the senior judges and their comments are solicited. The opinion is then finalized and printed in slip opinion form. The clerk's office never receives advance notice of when a decision will be rendered, so counsel should not call for such information.

It is the policy of the Fourth Circuit to mail a copy of the opinion to counsel on the day it is received from the printer. Upon written request, counsel will be called collect on that day and informed of the disposition of the case; the text of the opinion will not be read over the telephone.

I.O.P. 36.3. Publication of decisions.

Opinions delivered by the court will be published only if the author or a majority of the joining judges believe the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains an historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this court, or creates a conflict with a decision in another circuit.

I.O.P. 36.4. Unpublished dispositions.

Unpublished opinions give counsel, the parties and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants not represented by counsel. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the clerk's office and a copy may be obtained from the clerk's office for $1.00.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

I.O.P. 36.5. Citation of unpublished dispositions.

In the absence of unusual circumstances, this court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this court's unpublished dispositions in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the disposition in the appendix to the brief.

I.O.P. 39.1. Costs.

Taxation of costs is controlled by the provisions of FRAP 39(a) unless the court specifically directs otherwise in its decision or by subsequent order. The verified bill of costs may be that of party or counsel, and should be accompanied by the printer's itemized statement of charges. A late affidavit for costs must be accompanied by a motion for leave to file. The clerk rules on all bills of costs and objections in the first instance.

Taxation of costs will not be delayed by the filing of a petition for rehearing or other post-judgment motion. The only costs generally taxable in the court of appeals are: (1) the docketing fee if the case is reversed; and (2) the cost of printing or reproducing briefs and appendix, including exhibits. The cost of printing is to be determined by the actual costs, but local Rule 39 provides a ceiling on the costs awardable.

Although some costs are "taxable" in the court of appeals, all costs are recoverable in the district court after issuance of the mandate. If the matter of costs has not been settled before issuance of the mandate, the clerk will send a supplemental "Bill of Costs" to the district court for inclusion in the mandate at a later date.

Various costs incidental to an appeal must be settled at the district court level. Among such items are: (1) the cost of the reporter's transcript; (2) fee for filing the notice of appeal; (3) the fee for preparing and transmitting the record; and (4) the premiums paid for any required appeal bond. Application for recovery of these expenses by the successful party on appeal must be made in the district court, and should be made only after issuance of mandate by the court of appeals. These costs, if erroneously applied for in the court of appeals, will be disallowed without prejudice to the right to reapply for them in the district court. Where costs are sought for or against the United States, counsel should cite the statutory authority relied upon.

I.O.P. 40.1. Petitions for rehearing.

Although petitions for rehearing are filed in a great many cases, few are granted. Filing a petition solely for purposes of delay or in order merely to reargue the case is an abuse of privilege.

A suggestion for rehearing in banc may be combined with a petition for rehearing. Whenever a suggestion is contained in a petition, such fact must be stated plainly on the cover of and title of the document.

The court requires 15 copies of the petition. However, a pro se party who is indigent need file only the original. No answer to the petition shall be allowed unless ordered by the court. Absent such a request for an answer, a petition for rehearing ordinarily will be denied.

I.O.P. 40.2. Applications from the United States for an extension of time within which to file a petition for rehearing to enable the Solicitor General's Office to review the merits of a case.

Applications from the United States for an extension of time within which to file a petition for rehearing before the Fourth Circuit will be reviewed on a case by case basis. If sufficient grounds for an extension appear, an extension of up to 30 days will be granted. The need of the Office of the Solicitor General for time to conduct a thorough review of the merits of a case will be considered legitimate grounds for such an extension.

The order granting an extension of time will include a provision requiring the United States to notify the Office of the Clerk whenever it concludes, prior to the expiration of the time period, not to seek rehearing.

Upon receipt of notice from the United States that a petition will not be filed, the mandate of this court will issue forthwith, provided the notice is received at least 21 days after entry of judgment.

Should a private party seek an extension of time in a case in which the United States has been given additional time, an extension of equal duration will be given as a matter of course.

In cases decided adversely to the United States, the staff of the Clerk's Office will not send a petition for rehearing filed by a private party to the court until the 14-day period for United States' petition (or its request for an extension of time within which to file a petition) has run. (Added December 6, 1984.)

Editor's Note. — Former I.O.P. 40.2, Statement of Purpose, has been redesignated as I.O.P. 40.4.

I.O.P. 40.3. Submission of petitions for rehearing to the Court.

The Clerk's Office will hold any petition for rehearing, together with a suggestion for rehearing in banc, if any, until the time for filing all such petitions, for any extension thereof granted in the particular case, has run. Thereafter, all petitions for rehearing in the same case will be distributed to the Court simultaneously. (Added December 6, 1984.)

Editor's Note. — Former I.O.P. 40.3, Panel Rehearing, has been redesignated as I.O.P. 40.5.

I.O.P. 40.4. Statement of purpose.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist:

1. A material factual or legal matter was overlooked in the decision.
2. A change in the law occurred after the case was submitted and was overlooked by the panel.
3. The opinion is in conflict with another decision of the court or of another court of appeals and the conflict is not addressed in the opinion.

A petition should only be made to direct the court's attention to one or more of the above situations. The points to be raised should be succinctly listed in counsel's statement of purpose and, if a petition lacks such a statement, it will be returned to counsel without filing.

Editor's Note. — I.O.P. 40.4 was formerly designated as I.O.P. 40.2.

I.O.P. 40.5. Panel rehearing.

The panel of judges who heard and decided the appeal will rule on the petition for rehearing. The panel may include a senior circuit judge, a district judge, or a visiting federal appellate judge sitting in the Fourth Circuit by designation. On receipt of the votes, the judge who authorized the opinion will direct the clerk to enter an appropriate order, setting forth the vote of the panel.

If a petition for rehearing is granted, the original judgment and opinion of the court are vacated and the case will be reheard before the original panel. The court may direct the filing of additional briefs, or the parties may seek leave of court to file additional briefs.

Editor's Note. — I.O.P. 40.5 was formally designated as I.O.P. 40.3.

I.O.P. 41.1. Mandate.

The final judgment, opinion of the court, and directions as to costs constitute the mandate. The trial court record shall be returned to the clerk of that court simultaneously with the issuance of the mandate.

I.O.P. 41.2. Motion for stay of the mandate.

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion shall be denied unless there is a specific showing that it is not frivolous or filed merely for delay. The motion must present a substantial question or set forth good or probable cause for a stay. Only the original of the motion need be filed. Stay requests are normally acted upon without a request for a response.

I.O.P. 41.3. Petitions for writs of certiorari.

A petition for a writ of certiorari must be filed with the Supreme Court within 60 days of the entry of judgment in a criminal case or 90 days in a civil case. The time for the petition does not run from the issuance of the mandate, but from the date of judgment which is also the opinion date. If a petition for rehearing is timely filed, the time runs from the date of denial of that petition. Counsel should consult the Rules of the Supreme Court for details on how to proceed with the petition.

The Rules of the Supreme Court do not require that the record accompany a petition for certiorari and the record will not be forwarded unless specifically requested by the petitioner or counsel. Requests to certify and transmit the record to the Supreme Court prior to action on the petition for a writ of certiorari are disfavored by the Supreme Court. The Clerk of the Supreme Court will request the record from the court of appeals when review of the record is desired by the Supreme Court prior to action on a petition for writ of certiorari or upon granting certiorari if the record has not been earlier transmitted. The same procedures are followed if an appeal to the Supreme Court is filed pursuant to 28 U.S.C. § 1254(2).

If a case is remanded to the court of appeals from the Supreme Court, the case shall be reopened under the original docket number and the court of appeals may require additional briefs and oral argument, summarily dispose of the case, or take any other action consistent with the Supreme Court's opinion.

I.O.P. 42.1. Voluntary dismissals.

Once an appeal has been docketed, the parties may submit a signed stipulation that the proceedings be dismissed or the appellant may move to dismiss voluntarily the appeal, specifying the terms as to payment of costs and fees. Upon the agreement of the parties or if the motion is uncontested, the clerk is authorized to dismiss the appeal. Contested motions will be submitted to the court for resolution.

I.O.P. 45.1. Clerk's office.

The clerk's office is located on the second floor of the United States Courthouse in Richmond, Virginia and is open from 8:30 a.m. to 5:00 p.m. every weekday, except federal holidays. All correspondence concerning cases pending before the court should be addressed to:

Clerk, United States Court of Appeals for the
Fourth Circuit
United States Courthouse
Tenth and Main Streets
Richmond, Virginia 23219
Telephone 804/771-2213

I.O.P. 45.2. Public information.

Information concerning the status of appeals and the operation of rules and procedures may be obtained from the clerk's office by telephone inquiry. Matters of public record may be reviewed upon request at the clerk's office and case documents may be transmitted to the district court for review by counsel upon proper application to the clerk's office.

I.O.P. 45.3. Orders granted by clerk.

When an appellant fails to comply with the rules, requests, or directives of the court, the clerk is authorized to dismiss the appeal for want of prosecution. The clerk will notify the appellant and his counsel by letter of the party's failure to comply and allow appellant fifteen days to initiate action to remedy his default. Once a case is dismissed for failure to prosecute, reconsideration and reinstatement will only be granted by the court for good cause shown. The clerk also has the authority to grant certain non-controversial or unopposed motions under local Rule 27(b).

I.O.P. 46.1. Admission to practice.

Each applicant for admission to the bar of this court shall file with the clerk an application on the form approved by the court and furnished by the clerk. Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. A qualified attorney may be admitted upon personal appearance in open court. It is not necessary that an applicant appear in open court for the purpose of being admitted unless the court shall otherwise order.

Although it is not a prerequisite that an attorney be admitted to practice before filing notices, motions and briefs on appeal or noting an appearance, no attorney will be allowed to present oral argument until admitted to the bar of the court. Applications can be presented anytime prior to oral argument, including the day of argument. The requisite $20.00 fee must accompany the application, but attorneys appointed by the court to represent a party in forma pauperis, law clerks to judges of the court and counsel for the United States and any agency thereof who have a case pending before this court shall be admitted to the bar of this court without the payment of an admission fee.

Fees collected by the clerk from applicants for admission shall be deposited in a bank designated by the court and shall be used for the benefit of the bench and bar in the administration of justice. A certificate indicating that an attorney has been admitted to practice before the Fourth Circuit will be sent to counsel by mail after admission.

I.O.P. 46.2. Appearance of counsel, withdrawal, substitutions.

Each attorney of record must file a written appearance with the clerk within 10 days after the appeal is docketed or after being retained or appointed. At the time of docketing, the clerk will send to each counsel or party in the trial court a "designation of counsel" form. This form should be filled out and returned to the Clerk of the Fourth Circuit within 10 days. Thereafter, the court will send correspondence, notices of oral argument, and copies of final decisions only to those attorneys who have filed their appearance forms. More than one attorney of the same firm may sign the same form. This form does not affect the credit line listed on printed opinions, as that information is furnished to publishing firms from those names listed on the briefs.

Once an appearance in an appeal has been filed, an attorney may not withdraw from representation without notice to the party he is representing and consent of the court. A motion to withdraw should state fully the reason for the request. Substitution of counsel of record can be accomplished by submitting a counsel of record form or written appearance for new counsel along with existing counsel's motion to withdraw or strike appearance.

I.O.P. 46.3. Appointment of counsel.

In direct criminal appeals of indigents, appointment of counsel is made upon the docketing of the appeal without prior notice to the attorney if he formerly represented the appellant. The issuance of the Criminal Justice Act Form 20 constitutes the appointment. Together with the notice of his appointment under the Criminal Justice Act, the clerk shall send to the attorney so appointed a copy of the plan adopted by this court under the provisions of that act. The duty of counsel appointed under the CJA extends through preparing the case for the Supreme Court by advising the appellant in writing of his right to seek review in the Supreme Court and, if the appellant so requests in writing, filing a petition for a writ of certiorari.

Assignment of counsel is discretionary in other indigent cases. Therefore, such cases receive a preliminary review before a decision is made regarding appointment of counsel. In assigning counsel, the court may direct counsel to brief a particular issue, but counsel is free to address any additional issues which appear to him to be meritorious.

Unless compensation for legal services may become available to assigned counsel by statute, the court will pay the attorney a maximum fee of $250 plus expenses. To receive payment from the court, counsel must submit to the clerk's office an itemized statement of expenses, with receipts, when the appeal is concluded.

I.O.P. 46.4. Attorney fees and expenses.

The court may award attorney's fees and expenses whenever authorized by statute. Any application for an award must include a reference to the statutory basis for the request and a detailed itemization of the amounts requested. Local Rule 46(b) sets forth the procedures for an application made pursuant to the Equal Access to Justice Act. Court appointed counsel may apply for an award of fees and expenses, but any award by the court is in lieu of the regular appointment fees provided by the court. In certain agency cases, counsel may submit the standard government form for fees and expenses provided by the agency for approval by the court.

I.O.P. 46.5. Proceeding pro se.

An individual may proceed without the aid of counsel, but should so inform the court at the earliest possible time. In any pro se appeal, the clerk shall notify the parties that they shall file informal briefs as provided by local Rule 34(b). The court will independently review the record for meritorious claims and will also consider the need for the appointment of counsel when reviewing the appeal under local Rule 34(a). Cases involving pro se litigants are ordinarily not scheduled for oral argument.

I.O.P. 47.1. Corporate disclosure statements.

A corporate affiliate/financial interest disclosure statement is made on a form which is mailed to counsel by the clerk and is ordinarily filed at the same time as the designation of counsel form — within ten days of the notice of docketing and receipt of the form. If earlier pleadings are submitted for the court's consideration, however, the disclosure statement should be filed at that time.

I.O.P. 47.2. Judicial conference.

(a) There shall be held each year a conference of all the circuit and district judges, all bankruptcy judges and all full-time magistrates of the circuit for the purpose of considering the business of the courts, advising means of improving the administration of justice within such circuit, and discussion of ideas with respect to the administration of justice. It shall be the duty of every judge of the circuit in active service and every full-time magistrate to attend such conference.

(b) The first day of the conference shall be devoted to a session for the judges alone, in which there shall be discussed matters affecting the state of the dockets and the administration of justice in their respective districts.

(c) Members of the bar to be chosen, as hereafter set forth, shall be members of the conference and shall participate in its discussions and deliberations on the second and third days.

(d) Members of the conference from the bar shall be as provided by resolution of the active circuit judges sitting from time to time in administrative session.

(e) The circuit executive of this court shall be the secretary of the conference, and shall make and preserve an accurate record of its proceedings.

(f) Each member of the bar of the Fourth Circuit attending a judicial conference shall pay a registration fee in an amount fixed by the Court of Appeals, to be applied to the payment of the expenses of the conference as approved by the Chief Judge of the circuit. It is further provided that the Chief Judge may excuse the payment of the fee in individual cases. (Amended eff. February 6, 1985.)

APPENDIX

Resolution Respecting Bar Membership in the Judicial Conference of the Circuit

A. Subject to the provisions of paragraphs B. and C., the members of the conference from the bar of the circuit are as follows:

1. Ex officio members.
    - a. The presidents of the state bar associations of the states of the circuit. When two bar associations in the same state are both recognized under this rule, the president of each shall be entitled to attend, and the maximum number of members of the conference from the bar, from any state, under this provision, shall be limited to two. As long as there is only one state bar association in Maryland, the Bar Association of Baltimore City may be treated as a state bar association under this provision.
    - b. All United States Attorneys in the circuit.
    - c. All Federal Public Defenders in the circuit.
    - d. All Attorneys General of the states comprising this circuit.
    - e. One representative of each accredited law school within the circuit.
2. Members designated by judges.
    - a. Each active and senior circuit and district judge may annually designate one lawyer to be invited by the Chief Judge as a guest of the annual conference.
    - b. The Chief Judge may annually invite not more than ten (10) additional lawyers to be guests of the conference.
    - c. By attending three annual conferences as a guest invited under a. or b. above, a lawyer attains regular membership in the conference.
    - d. Regular membership is for a term of seven (7) years following its attainment. It entitles the member to attend all annual conferences held during that term, subject to e. below.
    - e. Unexcused absences from two successive, or a total of three, annual conferences during the term terminates a regular membership. For good cause the Chief Judge may excuse absences.
    - f. Following expiration of a regular membership, the lawyer may again be invited as a guest of, and attain regular membership, in the conference pursuant to a.-e. above.

B. This process is effective commencing with the 1983 annual conference, except that a judge may continue to designate the two lawyers invited by his designation to the 1982 conference and who actually attended so long as either shall not have received three invitations or until the 1986 conference, whichever first occurs. When a judge exercises his right to designate one or more lawyers who were invited to the 1982 conference and who attended, he shall not have the right to designate a lawyer to be invited under paragraph A.2.a. hereof.

C. The previous rules for attainment of permanent membership in the conference shall continue to apply to all lawyers first invited as guests down through the 1982 annual conference. All memberships attained under those rules will continue in effect as permanent memberships; provided that such a membership is terminated by three successive unexcused absences.

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FOURTH CIRCUIT JUDICIAL COUNCIL RULES FOR HANDLING COMPLAINTS OF JUDICIAL MISCONDUCT OR DISABILITY

Adopted October 5, 1981, effective October 1, 1981.

Index follows these rules.

1. Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals a written complaint containing a short and plain statement of the facts constituting such conduct. Anonymous complaints shall not be accepted.

2. Upon receipt of a complaint, the clerk shall promptly transmit it to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission who shall perform the duties of chief judge under these rules. The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

3. After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may:

(A) Dismiss the complaint, if he finds it to be (i) not in conformity with paragraph 1, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) Conclude the proceeding if he finds that appropriate corrective action has been taken.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

4. If the chief judge does not enter an order under paragraph 3, he shall promptly:

(A) Appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) Certify the complaint and any other such documents pertaining thereto to each member of such committee; and

(C) Provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

The circuit executive shall serve as secretary of the special committee and perform such other duties as may be assigned to him by the committee.

5. (A) Each committee appointed under paragraph 4 shall conduct an investigation as extensive as it considers necessary, exercising its subpoena power where deemed advisable, and shall expeditiously file a comprehensive written report thereon with the circuit judicial council. Such report shall present both the findings of the investiga-

tion and the committee's recommendations for necessary and appropriate action by the judicial council.

(B) Adequate prior notice of any investigation under paragraph 5(A) shall be given in writing to the judge or magistrate whose conduct is the subject of the complaint, and such judge or magistrate shall be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating committee, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing. The complainant shall be afforded an opportunity to appear at proceedings conducted by the investigating committee, if it concludes that the complainant could offer substantial information.

6. Upon receipt of a report filed under paragraph 5:

(A) The judicial council may conduct any additional investigation which it considers to be necessary, exercising its subpoena power when deemed advisable and affording to the judge or magistrate whose conduct is the subject of the complaint the rights specified in paragraph 5(B);

(B) The council shall take such action as is appropriate to assure the effective and expeditious administration of the business of the court concerned, including, but not limited to, any of the following actions:

(i) Directing the chief judge of the district of the judge or magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) Certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under 28 U.S.C. § 372(b);

(iii) Requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under 28 U.S.C. § 371 shall not apply;

(iv) Ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) Censuring or reprimanding such judge or magistrate by means of private communication;

(vi) Censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) Ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior; (II) any removal of a magistrate shall be in accordance with 18 U.S.C. § 631; and (III) any removal of a bankruptcy judge shall be in accordance with 28 U.S.C. § 153.

(C) The council shall immediately provide written notice to the complainant (with such restrictions on disclosure as the council deems appropriate) and to such judge or magistrate of the action taken under this paragraph.

(D) Each written order to implement any action under this paragraph which is issued by the judicial council shall be made available to the public through the office of the clerk of the court of appeals, provided that the name of the judge involved may, by order of the council, be withheld. Unless the interests of justice dictate otherwise, each such order issued under this paragraph shall be accompanied by written reasons therefor.

7. (A) The judicial council may also, in its discretion, refer any complaint, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior has engaged in conduct:

(i) Which might constitute one or more grounds for impeachment under Article 1 of the Constitution; or,

(ii) Which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) The judicial council acting under this paragraph shall, unless the interests of justice dictate otherwise, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

8. A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph 3 may, within 30 days, petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph 6 may, within 30 days, petition the Judicial Conference of the United States for review thereof. Except as provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

9. No judge or magistrate whose conduct is the subject of an investigation shall serve upon a special committee appointed under paragraph 4, or upon the judicial council, until all related proceedings have been finally terminated.

10. No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before the judicial council.

11. All papers, documents, and records of proceedings related to investigations shall be confidential and shall not be disclosed by any person in any proceeding unless:

(A) The judicial council, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under Article I of the Constitution; or

(B) Authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge, the Chief Justice of the United States, or the chairman of the standing committee established under 28 U.S.C. § 331.

12. The clerk of the court of appeals shall maintain files for the papers, documents and records arising from proceedings taken pursuant to these rules, separate and apart from all other files and records. Such files shall be maintained with appropriate security precautions to ensure their confidentiality.

13. Each written order to implement any action under this rule which is issued by the judicial council shall be made available to the public through the clerk's office. Unless contrary to the interests of justice, each such order shall be accompanied by written reasons therefor.

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Effective August 1, 1980

As Amended to January 1, 1986.

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I. General Rules

Rule 1.00 Scope and Citation of Local Rules.

These local rules of practice shall govern the conduct of the United States

District Court for the Eastern District of North Carolina except when the conduct of this court is governed by federal statutes and rules. A judge or magistrate, for good cause and in his discretion, may alter these rules in any particular case. These rules shall be cited: "Local Rule ________, EDNC".

Rule 2.00 Attorneys.

2.01: *Roll of Attorneys.* The bar of this court consists of those heretofore admitted and those hereafter admitted as prescribed by this Local Rule 2.00.

2.02: *Eligibility.* A member in good standing of the bar of the Supreme Court of North Carolina, who resides in the State of North Carolina and who maintains an office in the State of North Carolina, is eligible for admission to the bar of this court.

2.03: *Procedure for Admission.* Before being presented to the court for taking the required oath, an applicant for admission shall certify in a written application that such applicant:

(a) Is a member in good standing of the bar of the Supreme Court of North Carolina, a resident of North Carolina, and maintains an office in North Carolina; and,

(b) Has studied the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, and the Local Rules of this court.

In addition to these certifications, the written application shall contain the certification of two attorneys who are members in good standing of the bar of this court that the applicant is of good moral character and professional reputation and meets the requirements for admission. An applicant may be admitted to practice in this court by a judge or magistrate upon oral motion by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

> I do solemnly swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court, uprightly and according to law. So help me God.

Following the administration of the oath, the application shall be signed by the judge or magistrate and the applicant shall file the application, accompanied by a fee of $25.00, with the clerk. The clerk shall then issue the applicant a certificate of admission to the bar of this court. Upon the filing of a properly certified and executed application accompanied by the admission fee of $25.00, the clerk may accept for filing papers signed by the applicant. However, no applicant shall make an appearance on behalf of a client until the applicant has taken the oath.

2.04: *Representation by Local Counsel Who Must Sign All Pleadings.* Litigants in civil and criminal actions, except governmental agencies and parties appearing pro se, must be represented by at least one member of the bar of this court who shall sign each pleading, motion, discovery procedure or other document filed in this court. If an attorney appears solely to bring the litigant in compliance with this rule, he shall in each instance designate himself "LR 2.04 Counsel." In signing the pleading, motion, discovery request or other document, counsel certifies that he is an authorized representative for communication with the court about the litigation, and the document conforms to the practice and procedure of this court. However, counsel does not make the certification required by Rule 11 of the Federal Rules of Civil Procedure.

Nevertheless, the requirements of Rule 11 must be complied with by out-of-state counsel. Signatures in the following form shall be sufficient to comply with this rule:

____
James M. Jones
Attorney for Defendant
Jones, Jones and Jones
P.O. Box 500
New York, NY 10050
(212) 555-1212

____
John B. Counselor
Attorney for Defendant
Abbot, Ball and Counselor
P.O. Box 50
Raleigh, NC 27602
(919) 878-8787
LR 2.04 Counsel

(Amended effective January 1, 1986.)

2.05: *Appearances by Attorneys Not Admitted in the District.* Any person who is a member in good standing of the bar of a United States District Court and the bar of the highest court of any state or the District of Columbia shall be permitted to appear in a particular matter in association with a member of the bar of this court. The appearance of such a person in a particular matter shall confer jurisdiction upon this court for any alleged misconduct of that person or for any other purpose arising in the course of or in the preparation of such matter.

2.06: *Pleadings, Service, and Attendance by Local Counsel in Cases Where Out-of-State Attorneys Appear.* Pleadings and other documents filed in a case where an attorney appears who is not admitted to the bar of this court shall contain the individual name, firm name, address, and phone number of both the attorney making a special appearance under this Local Rule and the associated local counsel. In such a case, the service of all pleadings and notices as required shall be sufficient if served only upon the associated local counsel. (Amended effective January 1, 1986.)

2.07: *Withdrawal of Appearance.* No attorney whose appearance has been entered shall withdraw his or her appearance or have it stricken from the record, except with leave of the court.

2.08: *Courtroom Decorum.* Counsel shall conduct themselves with dignity and propriety. Counsel shall rise when addressing the court, and all statements to the court shall be made from counsel table or from behind the lectern facing the court. Counsel shall not approach the bench unless requested to do so by the court or unless permission is granted upon the request of counsel.

2.09: *Questioning of Witnesses.* Only one attorney for each party may question a particular witness unless the court allows otherwise. Counsel shall remain seated while questioning witnesses.

2.10: *Professional Standards.* The ethical standard governing the practice of law in this court is the Code of Professional Responsibility of the North Carolina State Bar, Incorporated now in force and as hereafter modified by the Supreme Court of North Carolina, except as may be otherwise provided by specific rule of this court. Counsel are directed to advise the Clerk within 10 days of disciplinary action taken against them resulting in suspension or disbarment. The disciplinary procedures of this court shall be on file with the clerk and furnished to counsel upon request.

Rule 3.00 Court Schedule and Conduct of Business.

3.01: *Headquarters of the Clerk.* The headquarters of the clerk of the court shall be in Raleigh.

3.02: *Divisions of the District.* There shall be five divisions of the court. Headquarters of each division and the counties comprising each division are as follows:

NAME OF DIVISION	*HEADQUARTERS*	*COUNTIES*	
Elizabeth City Division	Elizabeth City	Bertie	Hertford
		Camden	Northampton
		Chowan	Pasquotank
		Currituck	Perquimans
		Dare	Tyrrell
		Gates	Washington
		Halifax	
Fayetteville Division	Fayetteville	Cumberland	Sampson
		Robeson	
New Bern Division	New Bern	Beaufort	Lenoir
		Carteret	Martin
		Craven	Onslow
		Greene	Pamlico
		Hyde	Pitt
		Jones	
Raleigh Division	Raleigh	Edgecombe	Vance
		Franklin	Wake
		Granville	Wayne
		Harnett	Warren
		Johnston	Wilson
		Nash	
Wilmington Division	Wilmington	Bladen	Duplin
		Brunswick	New Hanover
		Columbus	Pender

(Amended December 19, 1984, eff. January 1, 1985.)

3.03: *Assignment of Cases to a Division.*

(a) *Civil Actions.* The clerk shall assign all civil actions to a division when the action is filed or removed. If one or more plaintiffs are residents of this District, the clerk shall assign the case to the division in which the first named such plaintiff resides. If no plaintiff resides in the District and one or more defendants reside in the District, the clerk shall assign the action to the division in which the first named such defendant resides. In the event no party resides in the District but the claim is alleged to have arisen in the District or to involve real property in the District, the clerk shall assign the action to the division in which such claim is alleged to have arisen or in which the real property is situate. In all other instances, a case shall be assigned to a division in the discretion of the clerk.

(b) *Criminal Actions.* The clerk shall assign all criminal indictments to a division when an indictment is filed or transferred. If the indictment alleges the crime occurred within the District, the clerk shall assign the action to the division in which the crime is alleged to have occurred. In cases where it is not alleged that the crime occurred in the District or in cases in which it is unclear in which division the alleged crime occurred, the clerk shall assign the indictment to the division in which the first named defendant, who resides within this District, resides. In all other instances, an indictment shall be assigned to a division in the discretion of the clerk.

(c) *Residence of Corporation.* For the purposes of this local rule, a corporate plaintiff shall be deemed to reside in the state in which it was incorporated and in the district and division in which it has its principal office; and, a corporate defendant shall be deemed to reside in the division in which the corporation is alleged to (1) be incorporated and have its principal office, or (2) be licensed to do business or (3) be doing business.

(d) *United States as Plaintiff.* For the purposes of this local rule, in cases where the United States, its agencies or officers acting in an official capacity, is the plaintiff it shall be deemed that such plaintiff does not reside in this district.

3.04: *Court in Continuous Session.* The court shall be in continuous session in all divisions of the District on all business days throughout the year. All matters of either a criminal or civil nature not reached at the regular sessions of court are deemed to be in an open status and subject to being called for disposition before the next regular session of court upon reasonable notice to the interested parties.

3.05: *Correspondence.* Correspondence addressed to the court shall indicate that copies have been transmitted to all other parties and failure to transmit the same to all other parties may result in sanctions by the court. Such correspondence shall not become a part of the record in the case. (Amended effective January 1, 1986.)

3.06: *Forms of Pleadings, Motions and Documents.* All pleadings, motions, discovery procedures, memoranda and other papers filed with the clerk or the court shall:

(a) After July 1, 1982, be on standard letter size (8½ x 11) paper; prior to that date, either legal or letter size paper will be accepted;

(b) state the court and division in which the action is pending;
(c) bear, except for initial filings, the case number assigned by the clerk;
(d) contain the caption of the case;
(e) if applicable, state the title of the pleading, motion, discovery procedure or document and the federal statute or rule number under which the party is proceeding;
(f) contain the individual name, firm name, address and telephone number of all attorneys who appear for the filing party, including an attorney making a special appearance pursuant to Local Rule 2.05;
(g) bear the date when signed by counsel;
(h) be signed by counsel as required by Local Rule 2.04; and
(i) on all documents, the signature of parties and counsel shall be followed, on the line immediately below, by the typed or printed name in the exact form as the signature. In preparation of documents for signature by a judge or magistrate, a blank space shall be provided below the signature line in which the name may be typed or printed; and
(j) have each page numbered sequentially. The following forms are examples to be followed:

The United States District Court
for the Eastern District of North Carolina
Wilmington Division

NO: _____ - _____ - _____

(Civil)

JAMES T. SMITH,		
	Plaintiff	
vs.		OFFER OF JUDGMENT Rule 68, F.R. Civ. P.
AARON T. JONES, et al		
	Defendants	

OR

(Criminal)

UNITED STATES OF AMERICA vs. AARON T. JONES, Defendant	MOTION TO TRANSFER PROCEEDING Rule 21(a), F.R. Crim. P.

(Closing)

This ______ day of January, 1980.

(signature)

____

John B. Counselor,
Attorney for the Defendant
Abbot, Ball and Counselor
Attorneys at Law
200 Main Street
Post Office Box 50
Raleigh, North Carolina 27602
A/C (919) 878-8787

OF COUNSEL:
James M. Jones
Attorney for the Defendant
Jones, Jones and Jones
Attorneys at Law
1000 Broadway
Post Office Box 500
New York, New York 10050
A/C (212) 555-1212

(Amended effective January 1, 1986.)

3.07:*[Reserved.]*

3.08: *Filing and Service of Papers.* Unless otherwise specifically provided for, the original of all pleadings and other papers required to be filed or served shall be filed with the clerk in the office of the clerk in Raleigh, Fayetteville, New Bern or Wilmington regardless of the division to which the case is assigned. When the law requires a proceeding to be heard and determined by a district court of three judges, pleadings and other documents shall be filed in triplicate. In all cases, whenever a pleading (subsequent to the complaint) or other paper is required to be filed with the clerk or with the court, a copy thereof shall be served upon opposing parties as provided in Rule 5(b), F.R. Civ. P.

3.09: *Discovery Materials Not to Be Filed Unless Ordered or Needed.* Depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto are not to be filed unless on order of the Court or for use in the proceeding. All such papers must be served on other counsel or parties entitled to service of papers filed with the Clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered. (Added July 1, 1982.)

Editor's Note. — Former Rule 3.05, concerning place and time of holding court, was deleted by amendment effective January 1, 1986, and Rules 3.06 and 3.07 were renumbered 3.05 and 3.06, respectively.

Rule 4.00 Motion Practice.

4.00: *Time for Filing.* All motions in civil cases except those relating to the admissibility of evidence at trial must be filed on or before 30 days following the conclusion of the period of discovery. If an extension of the original period of discovery is approved by the court, the time for filing motions is automatically extended to 30 days after the new date.

4.01: *General Requirements.* All motions shall be concise and shall state precisely the relief requested. Motions shall conform to the general motions requirements, standards and practices set forth in the applicable Federal Rules of Procedure and in Local Rule 3.07. Time for the filing of pre-trial motions in criminal cases is governed by Local Rule 44.00.

4.02: *Motions Relating to Discovery and Inspection.* No motions to compel discovery will be considered by the Court unless the motion sets forth, by item, the specific question, interrogatory, etc., objected to, along with the grounds supporting or in opposition to the objection. A discovery motion in a criminal action (Rule 16, F.R. Crim. P.) shall state that a request for discovery and inspection was made and denied.

4.03: *Supporting Memoranda.* Except for motions which the clerk may grant as specified in Local Rule 9.00, all motions made other than in a hearing or trial shall be filed with an accompanying supporting memorandum in the manner prescribed by Local Rule 5.01. Where appropriate, motions shall be accompanied by affidavits or other supporting documents.

4.04: *Responses to Motions.* Any party may file a written response to any motion. The response may be a memorandum in the manner prescribed by Local Rule 5.01 and may be accompanied by affidavits and other supporting documents. When the response is not a memorandum, the written response shall be accompanied by a supporting memorandum in the manner prescribed by Local Rule 5.01 and, when appropriate, by affidavits and other supporting documents. Responses and accompanying documents shall be filed within 20 days after service of the motion in question unless otherwise ordered by the court or prescribed by the applicable Federal Rules of Procedure. In the event no response is filed, the court may proceed to rule on the motion.

4.05: *Replies.* Replies to responses are discouraged. However, a party desiring to reply to matters raised initially in a response to a motion or in accompanying supporting documents shall file the reply within 10 days after service of the response, unless otherwise ordered by the court.

4.06: *Affidavits.* Ordinarily, affidavits will be made by the parties and other witnesses and not by counsel for the parties. However, affidavits may be made by counsel for a party if the sworn facts are known to counsel or counsel can swear to them upon information and belief, and

(a) the facts relate solely to an uncontested matter; or

(b) the facts relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the facts; or

(c) the facts relate solely to the nature and value of the legal services rendered for the party by such counsel or counsel's law firm; or

(d) the refusal to accept the affidavit would work a substantial hardship on the party and the court finds that its acceptance of the affidavit would not be such as to require that counsel or counsel's law firm be disqualified from continuing to appear for the party.

4.07: *Hearings on Motions.* Hearings on motions may be ordered by the court in its discretion. Unless so ordered, motions shall be determined without hearing. (Amended September 2, 1980.)

4.08: *Frivolous or Delaying Motions.* Where the court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing such motion.

Rule 5.00 Supporting Memoranda.

5.01: *Form and Content.* A memorandum shall be in the form prescribed by Local Rule 3.07 and shall contain:

(a) a concise summary of the nature of the case;

(b) a concise statement of the facts that pertain to the matter before the court for ruling;

(c) the argument (brevity is expected) relating to the matter before the court for ruling with appropriate citations in accordance with Local Rules 5.02, 5.03 and 5.04;

(d) copies of any decisions in cases cited as required by Local Rules 5.03, and 5.04; and

(e) where the supporting memorandum opposes a Motion for Summary Judgment a short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

5.02: *Citation of Published Decisions.* Published decisions cited should include parallel citations, the year of the decision, and the court deciding the case. The following are illustrations:

(1) State Court Citation: *Rawls* v. *Smith,* 238 N.C. 162, 77 S.E. 2d 701 (1953).

(2) District Court Citation: *Smith* v. *Jones,* 141 F. Supp. 248 (E.D.N.C. 1956).

(3) Court of Appeals Citation: *Smith* v. *Jones,* 237 F. 2d 597 (4th Cir. 1956).

(4) United States Supreme Court Citation: *Smith* v. *Jones,* 325 U.S. 196, 65 S. Ct. 1120, 89 L. Ed. 1154 (1956). If a petition for certiorari or an appeal was filed in the United States Supreme Court, the disposition of the case in that court should always be shown with parallel citations. For example:*Carson* v. *Warlick,* 238 F. 2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910, 77 S. Ct. 665, 1 L. Ed. 2d 664 (1957).

5.03: *Citation of Decisions Not Appearing in Certain Published Reports.* Decisions published outside the West Federal Reporter System, the official North Carolina reports and the official United States Supreme Court reports (e.g., CCH Tax Reports, Labor Reports, U.S.P.Q., reported decisions of other states or other specialized reporting services) may be cited if the decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed.

5.04: *Citation of Unpublished Decisions.* Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed. The unpublished decision of a United States District Court may be considered by this court. The unpublished decision of a United States Circuit Court of Appeals will be given due consideration and weight but will not bind this court. Such unpublished decisions should be cited as follows: *United States* v. *William Norman,* No. 74-50-CR(or CIV)-5 (E.D.N.C. January 7, 1975) and *United States* v. *Norman,* No. 74-2398 (4th Cir. June 27, 1975).

5.05: *Length of Memoranda.* Memoranda in support of or opposition to a motion shall not exceed thirty pages in length without prior court approval. Reply memoranda shall not exceed ten pages in length without prior court approval. (Added effective January 1, 1986.)

Rule 6.00 Jurors.

6.01: *Jury Lists.* When the jury for a session of the court is drawn, the clerk shall furnish a copy of the list to members of the bar of this court upon their request therefor. The list shall set out the name, address, occupation and employer of each juror and, where available, the name, address, occupation and employer of the spouse of each juror. The jurors and their families shall not be contacted, either directly or indirectly, in an effort to secure information concerning the background of any member of the jury panel. When the jurors are seated in the jury box, a chart or list shall be furnished by the clerk to the parties or their counsel, showing the name and seating assignment of each juror.

6.02: *Examination of Jurors.* The court shall conduct the examination of prospective jurors. Counsel shall file prior to trial a list of any *voir dire* questions counsel desires the court to ask the jury other than routine questions such as (1) the occupations and addresses of jurors and their spouses, (2) the identity and relation of jurors, the parties, counsel and witnesses and (3) the knowledge of the jurors concerning the case.

6.03: *Contact with Trial Jurors.* Following the discharge of a jury from further consideration of a case, no attorney or party litigant shall individually or through an investigator or any person acting for such attorney or party litigant ask questions of or make comments to a member of that jury or the members of the family of such a juror that are calculated merely to harass or embarrass such a juror or a member of such juror's family or to influence the actions of such a juror or a member of such juror's family in future jury service.

Rule 7.00 Release of Information to News Media.

7.01: *Court Personnel.* All court personnel, including but not limited to, the Marshal and deputy marshal and office personnel, the clerk and deputy clerks and office personnel, probation officers and office personnel, bailiffs, court reporters, and the judges' and magistrates' office personnel, are prohibited from disclosing to any person, where it can reasonably be expected to be disseminated by means of public communication, without authorization of the court, information relating to any pending matter, civil or criminal, that has not been filed as a part of the public records of the court. This proscription applies to the divulgence of any information concerning arguments and hearings held in chambers or otherwise outside the presence of the jury or the public.

7.02: *Copies of Public Records.* The members of the news media and others may obtain copies of all public records from the clerk upon payment of copying fees.

7.03: *Criminal Matters.* In addition to the provisions of this Local Rule 7.00, the provisions of Local Rule 45.00 shall apply to all criminal matters.

Rule 8.00 Photographing and Reproducing Court Proceedings.

The taking of photographs in the courtroom, court offices or in the corridors immediately adjacent thereto, during judicial proceedings or during any recess of the court, and the transmitting or sound-recording of such proceedings for broadcasting by radio or television shall not be permitted. Proceedings designated and conducted as ceremonies, such as naturalization proceedings, the administration of oaths of office to officers of the court, presentation of portraits and other ceremonial occasions, may be photographed in or broadcast from the courtroom, with the permission and under the supervision of the court.

Rule 9.00 Powers and Duties of the Clerk.

9.01: *Approval of Security.* The clerk or deputy clerk is authorized to approve all recognizances, stipulations, bonds, guaranties, or undertakings, in the penal sum prescribed by statute or order of the court, whether the security be property, or personal or corporate surety.

9.02: *Seizure of Person or Property.* All acts and duties pertaining to the seizure of person or property as provided by the law of the State of North Carolina authorized to be done by a judge or the clerk of the state court may be done in like cases by a judge of this court or the clerk of this court, respectively.

9.03: *Orders and Judgments.* The clerk or a deputy clerk is authorized to enter the orders and judgments listed below without further direction of the court. However, such action may be suspended, altered or rescinded by the court for cause shown.

(a) Consent orders for the substitution of attorneys.

(b) Orders enlarging time periods in civil actions authorized to be entered by the court by Rule 6(b), F.R. Civ. P.

(c) Orders extending for a reasonable amount of time the period within which an act must be performed under the local rules of this court.

(d) Consent orders dismissing an action, except in bankruptcy proceedings and in cases to which Rule 23(c) F.R. Civ. P. and Rule 66, F.R. Civ. P. apply.

(e) Orders canceling liability on bonds.

(f) Orders changing the time of opening and adjourning court in the absence of the judge.

(g) Judgments by default as provided for in Rule 55(a) and 55(b)(1), F.R. Civ. P.

(h) Orders authorizing service of process by a person other than a United States Marshal pursuant to Rule 4(c), F.R. Civ. P.

(i) Certification of law students and supervising attorney pursuant to Local Rule 13.00.

(j) Any other motion, rule or order which may be granted of course or without notice.

(k) Pursuant to the provisions of 28 U.S.C. § 956, the clerk or a deputy clerk, when there is need to serve a complaint and attachment upon a vessel, or any other process incident to admiralty and maritime claims, either *in rem* or *in personam,* are empowered to grant and enter an order authorizing any sheriff or any deputy sheriff, or other suitable person, to serve all such process.

9.04: *Handling of Exhibits.* The clerk shall be the custodian of all exhibits admitted into evidence. Upon 10 days' notice by mail to counsel for all parties, the clerk may, within 30 days after the entry of final judgment, destroy or otherwise dispose of the exhibits.

9.05: *Deposit of Registry Funds in Interest-Bearing Accounts.* Whenever an order of court directs the clerk to place registry funds into interest-bearing accounts, counsel shall confer with the clerk, within 5 days after receipt of the order, concerning the manner and place of investment. If counsel and the clerk do not agree, the clerk shall seek further direction from the court. No officer or employee of this court shall incur any liability for failure to invest or for improper investment unless counsel have complied with their obligations under this local rule.

9.06: *Court Libraries.* The clerk shall maintain for the court and the general use of members of the bar of this court the court libraries in the District. Books shall not be removed from the library without the consent of the person responsible for the maintenance of the particular library, and shall not be removed from the courthouse under any circumstances. A violation of this rule shall be punishable as for contempt of court. (Amended effective January 1, 1986.)

9.07: *Jurisdictional Agreements with Other Courts.* The clerk shall maintain all jurisdictional agreements entered into by the Chief District Judge of this court and the Chief District Judge of any other United States District Court and a copy of each such agreement and copies of such agreements shall be furnished to counsel upon request. (Amended effective January 1, 1986.)

Editor's Note. — Former Rule 9.06, concerning the Central Violations Bureau, was deleted by amendment effective January 1, 1986, and Rules 9.07 and 9.08 were renumbered 9.06 and 9.07, respectively.

Rule 10.00 Sureties.

10.01: *Security.* Except as otherwise provided by law, every recognizance, stipulation, bond, guaranty, or undertaking shall be with security that consists of either (1) cash or negotiable government bonds, or (2) one or more sureties, as provided by law or the applicable Federal Rules of Procedure. A judge may enter pertinent orders restricting any bonding company or surety company from being accepted as surety upon any bond in any case or matter in this District.

10.02: *Use of Real Property as Security.* Whenever a surety seeks to justify assets by demonstrating ownership of real property, a judge or magistrate shall determine by satisfactory evidence that the property is of sufficient unencumbered value to protect the interests of the adverse party.

10.03: *Prohibited Sureties.* Members of the bar, administrative officers and employees of this court, and the Marshal and deputies and assistants thereto shall not act as surety in any matter, criminal or civil, pending in this court.

Rule 11.00 Civil Rights Actions By Prisoners, 42 U.S.C. § 1983.

All complaints on behalf of state prisoners seeking relief under 42 U.S.C. § 1983 and federal prisoners challenging conditions of confinement shall be filed with the clerk in compliance with the instructions of the clerk and on the appropriate form available without charge. An original and one copy of the complaint for the court and one copy of the complaint for each defendant named in the action shall be filed.

CASE NOTES

Cited in Owens-El v. U.S. Att'y Gen., 759 F.2d 349 (4th Cir. 1985).

Rule 12.00 Habeas Corpus Actions (28 U.S.C. § 2254) and 28 U.S.C. § 2255 Motions.

All petitions on behalf of prisoners seeking relief under 28 U.S.C. §§ 2254 and 2255 shall be filed with the clerk in compliance with the instructions of the clerk and on the appropriate form available without charge. Such proceedings shall be governed by the rules promulgated by the United States Supreme Court.

Rule 13.00 Student Practice Rule.

13.01: *Compliance with Rule.* Students may participate as counsel in civil and criminal cases in this court subject to their compliance with all of the requirements of this Local Rule 13.00.

13.02: *Eligibility.* An eligible student must

(a) be duly enrolled in a law school;

(b) have completed at least 3 semesters of legal studies;

(c) have knowledge of the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, the Code of Professional Responsibility, and the Local Rules of this court;

(d) be supervised by a supervising attorney as defined in Local Rule 13.03;

(e) be certified by the Dean of the Law School where the student is enrolled, or the Dean's designee, as being of good character, sufficient legal ability, and adequately trained to fulfill the responsibilities of a legal intern to both the client and the court;

(f) be certified by the court to practice pursuant to this Local Rule 13.00; and,

(g) decline personal compensation for his or her legal services from a client or any other source.

13.03: *Supervising Attorney.* A supervisor must:

(a) either (1) have faculty or adjunct faculty status at a law school at which a portion of the supervisor's duties includes supervision of students in a clinical program; or (2) be a member of the bar of this court for at least 2 years, who in the determination of the court, is competent to carry out the role of supervising attorney;

(b) be admitted to practice in this court;

(c) be certified by the court as a student supervisor;

(d) be present with the student at all times in court, and at other proceedings in which testimony is taken;

(e) co-sign all pleadings or other documents filed with the court;

(f) assume full personal and professional responsibility for a student's guidance and any work undertaken and for the quality of the student's work, and to be available for consultation with represented clients;

(g) assist and counsel the student in activities mentioned in Local Rule 13.05, and review such activities with the student, all to the extent required for proper practical training of the student and the protection of the client; and

(h) supplement oral or written work of the student as necessary to insure proper representation of the client.

13.04: *Certification of Student and Supervisor.*

(a) *Student.* The court's certification of a student to practice under this Local Rule 13.00 shall be filed with the clerk and shall remain in effect for 18 months or until the student graduates from law school, whichever is earlier. Certification to appear generally or in a particular case may be withdrawn by the court at any time, in the discretion of the court, and without any showing of cause.

(b) *Supervising Attorney.* Certification of the supervising attorney shall be filed with the clerk, and shall remain in effect indefinitely unless withdrawn by the court, in its discretion, and without any showing of cause.

13.05: *Activities.* A certified student may under the personal supervision of his or her supervisor:

(a) represent any client including federal, state or local governmental bodies, if the client on whose behalf the certified student is appearing has consented in writing to that appearance and the supervising lawyer has given written approval of that appearance;

(b) represent a client in any criminal, civil or administrative matter; however, the court retains the authority to limit a student's participation in any individual case;

(c) in connection with matters in this court, engage in other activities on behalf of the client in all ways that a licensed attorney may, under the general supervision of the supervising lawyer; however, a student shall make no binding commitments on behalf of a client absent prior client and supervisor approval, and in any matters, including depositions, in which testimony is taken the student must be accompanied by the supervising lawyer. Documents or papers which are filed shall be read, approved, and co-signed by the supervising lawyer. The court retains the authority to establish exceptions to such activities; and,

(d) prior to oral participation by a certified student in a hearing or trial, the supervising attorney shall provide the court with a written statement of the scope of participation anticipated on the part of the certified student.

Rule 14.00 Naturalization.

Petitions for naturalization will be considered and acted upon, and appropriate ceremonies conducted in connection therewith, on Wednesday of the first week of any regular session of Court at which naturalization hearings are set, beginning at 2:00 o'clock P.M., unless otherwise ordered by the court. The court may at other times, in its discretion, for good cause shown, and upon reasonable prior notice by the applicant to the Immigration and Naturalization Service, consider and act upon petitions for naturalization by members of the armed services, seamen on merchant vessels registered under the laws of the United States, and members of the immediate families and dependents of such personnel, and in other exceptional cases.

Rule 15.00 Sanctions.

If an attorney or any party fails to comply in good faith with any local rule of this court, the court in its discretion may impose sanctions.

Rule 16.00 Taxation of Juror Costs.

16.01: *Settlement before Trial.* Whenever a civil action scheduled for jury trial is settled or otherwise disposed of in advance of the actual trial, then, except for good cause shown, juror costs for one day shall be assessed equally against the parties and their counsel or otherwise assessed or relieved as directed by the court. Juror costs include attendance fees, per diem, mileage, and parking. No juror costs will be assessed if notice of settlement or other disposition of the case is given to the court one full business day prior to the scheduled trial date. (Added August 26, 1985 and amended November 21, 1985, effective January 1, 1986.)

16.02: *Settlement before Verdict.* Except upon a showing of good cause, the court shall assess the juror costs equally against the parties and their counsel whenever a civil action proceeding as a jury trial is settled at trial in advance of the verdict. The judge may, in his discretion, direct that the juror costs be relieved or that they be assessed other than equally among the parties and their counsel. (Added effective January 1, 1986.)

Rules 17.00 to 19.00: Reserved for future purposes.

II. Civil Rules

Rule 20.00 Minors and Incompetents as Parties.

20.01: *Representation.* Representation of minor and incompetent parties in a civil action shall be in accordance with Rule 17(c), F.R. Civ. P. Appointments of guardians *ad litem* by any state court shall satisfy the requirements of the Federal Rules of Civil Procedure unless the court finds that the interests of the parties so represented are not being adequately protected.

20.02: *Settlement or Dismissal of Actions.* No civil action to which a minor or incompetent person is a party shall be compromised, settled, discontinued, or dismissed without an Order of Approval entered by the court. It shall be the responsibility of counsel for the minor or incompetent parties to prepare a proposed Order of Approval for submission to the court. The Order of Approval shall bear the written consent of (1) counsel for all the parties to the action, (2) the legal representative of minor or incompetent parties, and (3), in the case of minors, at least one of the natural parents or persons standing *in loco parentis.* Unless otherwise ordered by the court, the Order of Approval shall contain statements as to the following:

(a) that all parties are properly represented and are properly before the court; that no questions exist as to misjoinder or nonjoinder of parties; and that the court has jurisdiction over the subject matter and the parties;

(b) if the minor or incompetent parties are plaintiffs, a summary of contentions sufficient to show that the complaint states a claim upon which relief can be granted; if the minor or incompetent parties are defendants, a statement of contentions sufficient to show that no affirmative defenses could clearly be raised in bar of recovery;

(c) a summary of services rendered by counsel for the minor or incompetent parties, along with an opinion as to the fairness and reasonableness of the settlement, if any; and

(d) in cases involving claims for personal injuries asserted by minor or incompetent parties, an estimate of actual and foreseeable medical, hospital and related expenses and a statement by an examining physician setting forth the nature and extent of the plaintiff's injuries, extent of recovery and prognosis.

20.03: *Approval of Counsel Fees and Payment of Judgments.* In its Order of Approval, the court shall approve or fix the amount of the fee to be paid to counsel for the minor or incompetent parties and make appropriate provision for the payment thereof. The Order of Approval shall also provide the manner in which judgments, if any, are to be paid and may make specific provisions for the payment of medical, hospital and similar expenses when allowed by applicable law.

Rule 21.00 Consent of Parties to Civil Trial Jurisdiction of Magistrates.

(a) Unless the judge to whom a civil action is assigned directs otherwise, the clerk shall routinely assign to a magistrate cases in which all parties consent to the exercise of civil trial jurisdiction pursuant to 28 U.S.C. Section 636(c).

(b) Appeals from a judgment of a magistrate pursuant to 28 U.S.C. Section 636(c)(4) shall lie to the judge to whom the case was originally assigned. (Amended effective January 1, 1986.)

Rule 22.00 Subsequent Litigation by Parties Proceeding in Forma Pauperis.

A plaintiff who has proceeded unsuccessfully *in forma pauperis* and had the costs of that litigation taxed against him must demonstrate that he has paid or made a reasonable effort to pay those costs prior to being authorized to proceed again *in forma pauperis.* (Added effective January 1, 1986.)

Rule 23.00 Discovery Conference, Rule 26(f), F.R. Civ. P.

A discovery conference may be held in every civil action at the earliest practicable date following the close of the pleadings in accordance with Rule 26(f), F.R. Civ. P. The conference shall be informal in nature and for the purpose of setting a preliminary plan and schedule for discovery, pre-trial conferences and trial. Subject to the provisions of Local Rule 2.06, counsel for all parties shall participate in the discovery conference.

Rule 24.00 Civil Discovery.

24.01: *Conducting Discovery.* In all civil actions, the parties shall schedule and conduct discovery in accordance with the order entered pursuant to Rule 16, F.R. Civ. P. All discovery motions and requests shall be propounded so as to allow the respondent sufficient time to answer prior to the time when discovery is scheduled to be completed. To shorten discovery time, it is expected that discovery procedures will proceed concurrently. After the time for completing discovery has expired, further discovery may proceed only by order of the court and may, in no event, interfere with the conduct of either the final pre-trial conference or the trial. (Amended effective January 1, 1986.)

24.02: *Numbering Discovery Procedures.* Each time a particular discovery procedure is used, it shall be sequentially numbered (e.g., "First Set", "Second Set", "First Request", "Second Request", etc.) so that it will be distinguishable from a prior procedure.

24.03: *Form of Interrogatories, Responses and Objections.* All interrogatories shall be served on opposing counsel. Three copies shall be served on counsel for the respondent. There shall be sufficient space following each question in which the respondent shall state the response. If the space provided is not sufficient, additional pages shall be attached. An objection to an interrogatory shall be made by stating the objection and the reason therefor in the space provided for the response. Before filing the interrogatories containing the responses and objections, if any, the responding party shall attach thereto a cover sheet containing a statement (1) that each response separately and fully answers each interrogatory, except those to which objections are made, and (2) the capacity, if any, in which such respondent is acting, which statement shall be signed and verified by the respondent. Where there are objections, there shall be attached to the interrogatories a second sheet, signed by counsel making such objection, stating the number of each such interrogatory and incorporating by reference the reason stated for each objection.

24.04: *Depositions for Use at Trial.* Depositions *de bene esse* shall not be regarded as being within the rules applicable to discovery.

Rule 25.00 Final Civil Pre-Trial Conference.

25.01: *Scheduling and Notice.* A final pre-trial conference shall be scheduled in every civil action after the time for discovery has expired. The clerk shall give at least 30 days' notice of such conference.

25.02: *Preparation by Counsel for Final Pre-Trial Conference.* At least 10 days prior to the final pre-trial conference, trial counsel for each of the parties shall confer and prepare a proposed final pre-trial order. It shall be the duty of counsel for the plaintiff to arrange for this conference. In the absence of an agreement to the contrary, the conference of attorneys shall be held in the office of the attorney nearest the headquarters of the division to which the action has been assigned. Each counsel shall bring to the conference copies of exhibits to be introduced into evidence, lists of witnesses to be called, and designations of discovery material to be used at trial.

25.03: *Form of Pre-Trial Order.* The pre-trial order shall be prepared in one sequential document without reference to attached exhibits or schedules and shall contain the following in five separate sections, numbered by roman numerals, as indicated:

(a) I. *Stipulations.* Stipulations covering jurisdiction, joinder, capacity of the parties, all relevant and material facts, legal issues and factual issues.

(b) II. *Contentions.* Contentions covering matters on which the parties have been unable to stipulate, including jurisdiction, misjoinder, capacity of the parties, relevant and material facts, legal issues and factual issues. Claims and defenses as to which no contentions are listed in the pre-trial order are deemed abandoned.

(c) III. *Exhibits.* A list of exhibits that each party may offer at trial, including any map or diagram, numbered sequentially, which numbers shall remain the same throughout all further proceedings. Copies of all exhibits shall be provided to opposing counsel not later than the attorney conference provided for in Rule 25.02. The court may excuse the copying of large maps or other exhibits. Except as otherwise indicated in the pre-trial order, it will be deemed that all parties stipulate that all exhibits are authentic and may be admitted into evidence without further identification or proof. Grounds for objection as to authenticity or admissibility must be set forth in the pre-trial order.

(d) IV. *Designation of Pleadings and Discovery Materials.* The designation of all portions of pleadings and discovery materials, including depositions, interrogatories and request for admissions that each party may offer at trial by reference to document volume, page number, and line. Objection by opposing counsel shall be noted by document volume, page number and line, and reasons for such objections shall be stated.

(e) V. *Witnesses.* A list of the names and addresses of all witnesses each party may offer at trial, together with a brief statement of what counsel proposes to establish by their testimony.

25.04: *Pre-Trial Conference.*

(a) *Purpose.* To resolve any disputes concerning the contents of the pre-trial order.

(b) Counsel shall be fully prepared to present to the court all information and documentation necessary for completion of the pre-trial order. Failure to do so shall result in the sanctions provided by this rule.

(c) *Sanctions.* Failure to comply with the provisions of Rule 25.04(b) may result in the imposition of a monetary fine not to exceed $250.00 against the offending counsel and may result in any other sanction allowable by the Federal Rules of Civil Procedure against the parties or their counsel.

(d) Counsel for plaintiff shall be responsible for preparing the final pre-trial order and presenting it to the court, properly signed by all counsel, at a time to be designated by the court. Upon approval by the court, the original shall be filed with the clerk.

25.05: *Form of Pre-Trial Order.* A pre-trial order in the following form shall be sufficient to comply with these rules:

JOHN DOE, by his guardian) No. 82-1-CIV-8
ad litem, JANE DOE)
Plaintiff)
)
v.)
PRE-TRIAL ORDER
)
XYZ CORP.)
Defendant.)

Date of Conference: ______________ August 1982.

Appearance: John Y. Lawyer, Raleigh, North Carolina, for plaintiff; Sam X. Attorney, Fayetteville, North Carolina, for defendant.

I. STIPULATIONS.

A. all parties are properly before the court;
B. the court has jurisdiction of the parties and of the subject matter;
C. all parties have been correctly designated;
D. there is no question as to misjoinder or nonjoinder of parties;
E. plaintiff, a minor, appears through her guardian;
F. **Facts:**
  1. Plaintiff is a citizen of Wake County, North Carolina.
  2. Defendant is a New York corporation, licensed to do business and doing business in the State of North Carolina.
G. **Legal Issues:**
  May a 9-year old minor be guilty of contributory negligence?
H. **Factual Issues:**
  1. Was plaintiff injured and damaged by the negligence of the defendant?
  2. What amount, if any, is plaintiff entitled to receive of defendant as compensatory damages?

II. CONTENTIONS

A. Plaintiff

1. Facts:
   (a) That Richard Roe was driving defendant's truck as defendant's agent.
   (b) That Richard Roe was negligent in that he drove at an excessive speed and while under the influence of intoxicating liquor.
2. Factual Issues:
   What amount, if any, is plaintiff entitled to recover of defendant as punitive damages?

B. Defendant

1. Facts:
   That Richard Roe, a former employee, took defendant's truck without authorization and, at the time of the accident, was not the agent or employee of defendant.
2. Factual Issues:
   Did plaintiff, by his own negligence, contribute to his injury and damage?

III. EXHIBITS

A. Plaintiff

Number	Title	Objection
1	Patrol Report	Hearsay
2	Photo of Plaintiff	

B. Defendant

Number	Title	Objection
1	Photo of Scene	
2	Scale Model	

IV. DESIGNATION OF PLEADINGS AND DISCOVERY MATERIALS

A. Plaintiff

Document	**Portion**	**Objection**	**Reason**
Plaintiff's first set of interrogatories	Nos. 1, 8 and 9	No. 8	Privilege
Deposition of Richard Roe	Vol. 1, line 6, p. 1, thru line 5, p. 6	Line 6, p. 1 thru line 2, p. 7	Hearsay

B. Defendant
None

V. WITNESSES

A. Plaintiff

Name	Address	Proposed Testimony
John Jones	615 Rains Street Raleigh, N.C.	Facts surrounding accident, extent of
Frank Flake	Selma, N.C.	Speed of defendant's vehicle, intoxication driver
Joe Rock	Temple, Ariz.	

B. Defendant

All witnesses listed by plaintiff.

Name	Address	Proposed Testimony
Sam Smith	4 Appian Way Rome, Italy	Facts surrounding the theft by driver of the vehicle

Trial Time estimate: . . . . . days.

. . . .

JOHN Y. LAWYER

Counsel for Plaintiff

. . . .

SAM X. ATTORNEY

Counsel for Defendant

APPROVED BY:

. . . .

J. RICH LEONARD

Magistrate

. . . . 1982

Rule 26.00 Attorney Preparations for Civil Trial.

On or before the Thursday preceding the first day of the session at which a civil action is set for trial, counsel for all parties shall file with the clerk:

26.01: *In All Cases.*

(a) A concise memorandum of authorities on all anticipated evidentiary questions and on all contested issues of law;

(b) motions relating to the admissibility of evidence.

26.02: *In Jury Cases.*

(a) a list of all voir dire questions as required by Local Rule 6.02;

(b) Requests for Jury Instructions. Those requests to Devitt & Blackmar (3d Ed.); 5th Circuit Pattern Instructions; and North Carolina Pattern Instructions shall be by reference. All other requests shall contain citations to supporting authorities.

26.03: *In Non-Jury Cases.* Proposed findings of fact and conclusions of law.

26.04: *Late Development in the Case.* Counsel shall immediately inform the court, opposing counsel and counsel in the next succeeding two cases on the calendar of any settlement or of any developments of an emergency which may necessitate a motion for continuance.

Rule 27.00 Civil Trials.

27.01: *Opening Statements.* At the beginning of the trial, each party (beginning with the party having the burden of proof on the first issue) shall, without argument and in such reasonable time as the court allows, state to the court and the jury the following:

(a) the substance of the claim, counterclaim, crossclaim or defense; and

(b) what counsel contends the evidence will show.

Parties not having the burden of proof on the first issue may elect to make an opening statement immediately prior to presenting evidence, rather than at the beginning of the trial.

27.02: *Witnesses.* Counsel may not release a person from a subpoena without notice to opposing counsel and leave of court. A party objecting to the release of a person shall bear all costs incident to such person which arise subsequent to the request for release. The court may, in its discretion and in the interest of justice, permit a party to call and examine a witness not listed in the final pre-trial order.

27.03: *Exhibits.*

(a) All exhibits shall be premarked with stickers obtained from the clerk's office with the sequential numbers as listed in the pre-trial order.

(b) Copies of all exhibits, properly bound, shall be provided to the court at the beginning of the trial.

(c) The original exhibit shall bear a sticker. After receipt into evidence, it shall remain in the custody of the courtroom deputy, except when being used by a witness or viewed by the jury.

(d) Copies of all exhibits shall bear the photostatic image of the sticker or a typed or printed reproduction thereof.

(e) Counsel are encouraged to provide one or more copies of exhibits for use by the jury.

(f) Upon presentation of an exhibit to a witness, counsel shall announce to the court the exhibit number. The exhibit shall not be handed to opposing counsel. Should opposing counsel contend that a copy has not been provided or that the exhibit has been lost or misplaced, that shall be brought to the attention of the court.

27.04: *Closing Argument.* The court will set the times for closing argument after consultation with parties. Unless otherwise ordered by the court, the party with the burden of proof shall open and close the arguments. The opening argument may not be waived.

27.05: *Taking Verdicts and Polling the Jury.* The court may take the verdict of the jury in open court in the absence of any party or counsel. Unless the contrary affirmatively appears of record, it will be presumed that the parties were present or by their voluntary absence waived their presence. The jury will not be polled unless a party requests a poll at the time the verdict is taken or unless a poll is ordered by the court.

Rule 28.00 Civil Contempt.

28.01: *Rights of Contemnor.* In all cases of civil contempt, the contemnor shall have due notice of the contempt charges, opportunity to reply to the charges and notice of the date and place of hearing in open court from which the public shall not be excluded.

28.02: *Summary Contempt Proceedings.* In contempt proceedings where the court may act summarily, the contemnor shall have the right to defend against the charges and to offer evidence in the form of affidavits. The movant shall have the right to offer the similar evidence.

28.03: *Plenary Contempt Proceedings.* In contempt proceedings where the court may not act summarily, the presentation of evidence is governed by Rule 1101 of the Federal Rules of Evidence. In no case of civil contempt, however, shall the parties be entitled to trial by jury, but rather the district judge before whom the matter is tried shall find the facts and enter a judgment or order in accordance with the provisions of the Federal Rules of Civil Procedure applicable to non-jury cases.

Rules 29.00 to 39.00: Reserved for future purposes.

III. Criminal Rules

Rule 40.00 Prompt Disposition of Criminal Cases.

The Plan for Achieving Prompt Disposition of Criminal Cases adopted by the Judges of this District is incorporated in these Local Rules by reference thereto as Appendix A.

Rule 41.00 Waiver of Appearance in Misdemeanor Cases, Rule 43(c)(2), F.R. Crim. P.

A defendant in misdemeanor cases may execute a written waiver of appearance which contains the following statements:

(a) the designation of counsel to appear in behalf of the defendant and the granting to such counsel of full authority to enter on behalf of the defendant a plea of guilty, not guilty, or nolo contendere to the offense charged, or to a lesser offense or offenses in lieu thereof;

(b) a consent to trial by the magistrate; and, a waiver of: (1) the right to be tried and sentenced by a district judge, (2) the right to a jury trial, (3) the right to testify in person, and (4) the right to face his or her accusers;

(c) an agreement to be bound by the decisions of the court as in any other case of adjudication and the entry of judgment subject to the right of appeal as in any other case; and,

(d) the circumstances which justify the approval of the written waiver of appearance by the court.

The waiver of appearance must (1) be in writing, (2) be signed by the defendant and his or her counsel, (3) be consented to by the United States Attorney or an Assistant United States Attorney and (4) be approved by the court.

Rule 42.00 Arraignment.

Ordinarily arraignments shall be conducted by magistrates under the provisions of Rule 19(B)(4), F.R. Crim. P. The presence of the United States Attorney at arraignment is not mandatory, and in the absence of the United States Attorney the magistrate shall conduct the arraignment in accordance with Rule 10, F.R. Crim. P. When a judge conducts the arraignment, the United States Attorney or an Assistant United States Attorney shall be present.

Rule 43.00 Criminal Pre-Trial Discovery and Inspection.

43.01: *Criminal Pre-Trial Conference.* Within twenty days after indictment or initial appearance, which ever comes later, the United States Attorney shall arrange and conduct a pre-trial conference with counsel for the defendant.

At the pre-trial conference and upon the request of counsel for the defendant, the government shall permit counsel for the defendant:

(a) to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(b) to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(c) to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(d) to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which is the property of the defendant and which are within the possession, custody or control of the government;

(e) to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record; and

(f) to inspect, copy or photograph any exculpatory evidence. (Amended effective January 1, 1986.)

43.02: *Discovery from Defendant.* Thereafter and upon the request of the government, counsel for the defendant shall:

(a) permit the United States Attorney to inspect and copy or photograph any document or other physical object intended to be introduced as an exhibit of the defendant at the trial;

(b) permit the United States Attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular cases, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to the testimony of such witness; and

(c) disclose the substance of any alibi or similar defense intended to be presented by the defendant. (Amended effective January 1, 1986.)

43.03: *Exchange of Discovery by Mail.* The United States Attorney and counsel for the defendant, in lieu of the conference, may agree to the exchange of discovery material by mail. (Added effective January 1, 1986.)

43.04: *Further Discovery or Inspection.* In the event that either party thereafter moves to compel compliance with Local Rule 43.01 or for additional discovery or inspection, such motion shall be filed within the time period set by Local Rule 44.00. The motion shall contain:

(a) the statement that the prescribed conference was held;

(b) the date of said conference;

(c) the names of all counsel participating in the conference; and

(d) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of the motion and the reasons given for the same. (Amended effective January 1, 1986.)

43.05: *Duty of Disclosure:* Any duty of disclosure and discovery set forth in Local Rule 43.00 is a continuing one and the United States Attorney and counsel for the defendant shall produce voluntarily any additional relevant information gained by either of them. (Amended effective January 1, 1986.)

Editor's Note. — Former Rules 43.02 and 43.03 were renumbered 43.04 and 43.05, respectively, by amendment effective January 1, 1986.

Rule 44.00 Time Period for Filing Pre-Trial Motions in Criminal Cases.

All pre-trial motions, including but not limited to motions to suppress and motions under Rules 7, 12, 14, 16, and 41, F.R. Crim. P., shall be filed no later than thirty days after indictment or initial appearance, whichever comes later. Responses shall be filed within ten days after the service of such motions. Untimely motions may be summarily disregarded. (Amended effective January 1, 1986.)

CASE NOTES

Stated in United States v. A-A-A Elec. Co., 607 F. Supp. 266 (E.D.N.C. 1985).

Rule 45.00 Publicity in Criminal Matters.

45.01: *Statements by One Participating in or Associated with an Investigation.* An attorney participating in or associated with the investigation of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(a) information contained in a public record;
(b) that the investigation is in progress;
(c) the general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim;
(d) a request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto; and
(e) a warning to the public of any dangers.

45.02: *Statements after Filing Complaint, Information, or Indictment, Issuance of Warrant or Arrest.* An attorney or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication that relates to:

(a) the character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) for the accused;
(b) the possibility of a plea of guilty to the offense charged or to a lesser offense;
(c) the existence or contents of any confession, admission, or statement given by the accused or the refusal or failure of the accused to make a statement;
(d) the performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests;
(e) the identity, testimony, or credibility of a prospective witness; or
(f) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

45.03: *Statements That Can Be Made.* This rule does not preclude an attorney during such period from announcing:

(a) the name, age, residence, occupation, and family status of the accused;
(b) if the accused has not been apprehended, any information necessary to aid in apprehension of the accused or to warn the public of any dangers the accused may present;

(c) a request for assistance in obtaining evidence;
(d) the identity of the victim of the crime;
(e) the fact, time, and place of arrest, resistance, pursuit, and use of weapons;
(f) the identity of investigating and arresting officers or agencies and the length of the investigation;
(g) at the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement;
(h) the nature, substance, or text of the charge;
(i) quotations from or references to public records of the court in the case;
(j) the scheduling or result of any step in the judicial proceedings; or
(k) that the accused denies the charges made against him.

45.04: *Statements during Jury Selection or Trial.* During the selection of a jury or the trial of a criminal matter, an attorney or a law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that the attorney may quote from or refer without comment to public records of the court in the case.

45.05: *Statements after Trial, Disposition without Trial, or Sentencing.* After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, an attorney or a law firm associated with the prosecution or defense shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the sentence.

45.06: *Statements of Staff and Employees.* An attorney shall exercise reasonable care to prevent employees and associates from making an extra-judicial statement that the attorney would be prohibited from making under this Local Rule 45.00 and Local Rule 7.00.

Rule 46.00 Petition for Disclosure of Presentence or Probation Records.

No confidential records of this court maintained by the probation office, including presentence and probation supervision records, shall be sought by any applicant except by written petition to this court establishing with particularity the need for specific information in the records. Whenever a probation officer is served with a subpoena or other judicial process seeking the production or disclosure of pre-sentence and probation records and reports, the probation officer shall petition the Chief Judge of this court in writing for instructions with respect to responding to such process. In no event shall production or disclosure be made except pursuant to an order by a judge.

Rule 47.00 Time of Issuance of Subpoenas in Criminal Cases.

Subpoenas for witnesses in criminal cases shall be delivered to the Marshal or other person qualified to make service at least 7 days prior to the Monday of the week in which the case is set for trial. The failure of the Marshal or other qualified person to serve a subpoena not delivered within this time period shall not constitute sufficient cause for a continuance.

Rule 48.00 Appearance of Counsel in Criminal Cases.

48.01: *Obligation to Notify the Court.* A defendant who does not apply for representation at government expense, or who is deemed ineligible after application, must inform the court of the identity of retained counsel within 10 days of his first appearance before a judicial officer in this district. Retention of counsel outside this period will not constitute grounds for a continuance of pre-trial proceedings or trial unless the defendant demonstrates due diligence in attempting to retain counsel. (Added effective January 1, 1986.)

48.02: *Notice of Appearance.* Counsel representing a defendant in a criminal action shall file a Notice of Appearance with the Clerk and serve the U. S. Attorney and other counsel with a copy. (Added effective January 1, 1986.)

Rule 49.00 Attorney Preparations for Criminal Trial.

(a) Unless the parties have previously entered into and executed a written plea agreement, counsel for each party shall file with the Clerk and the assigned judge, on or before the Thursday preceding the first day of the session at which the criminal action is set for trial:

(1) voir dire questions as required by Local Rule 6.02;
(2) requests for jury instructions.

(b) Before jury selection begins, all parties shall file with the court a list of all witnesses each party, in good faith, reasonably anticipates will be called in its evidence-in-chief. (Added effective January 1, 1986.)

Rules 50.00 to 59.00: Reserved for future purposes.

IV. Magistrates

Rule 60.00 Standards of Performance.

In performing duties for the court, a magistrate shall conform to all applicable provisions of federal statutes and rules, to the Local Rules and procedures of this court, and to the requirements specified in any order of reference from a judge.

Rule 61.00 Assignment of Matters to Magistrates.

61.01: *Criminal Cases.*

(a) *Misdemeanor Cases.* Upon the filing of an information, complaint or violation notice, or the return of an indictment, all misdemeanor cases shall be assigned by the clerk to a magistrate, who shall proceed in accordance with the provisions of 18 U.S.C. § 3401 and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

(b) *Felony Cases.* Upon the return of an indictment or the filing of an information, all felony cases shall be assigned by the clerk to a magistrate for the conduct of an arraignment and such pretrial conferences as are necessary, and for the hearing and determination of all pretrial procedural and discovery motions, in accordance with Local Rule 62.04.

61.02: *Civil Cases.* Upon filing, all civil cases shall be assigned by the clerk to a magistrate for the conduct of such discovery and pretrial conferences as are necessary and for the hearing and determination of all pretrial procedural and discovery motions, in accordance with Local Rule 62.03. Where designated by a judge, the magistrate may conduct additional pretrial conferences and hear the motions and perform the duties set forth in Local Rules 62.04, 62.05 and 62.06. Where the parties consent to trial and disposition of a case by a certified magistrate under Local Rule 21.00, such case shall, with the approval of the judge to whom it was assigned at the time of filing, be reassigned to a certified magistrate for the conduct of all further proceedings and the entry of judgment.

61.03: *General.* Nothing in these rules shall preclude a judge from reserving any proceeding for conduct by a judge, rather than a magistrate. The judge, moreover, may by order modify the method of assigning proceedings to a magistrate as changing conditions may warrant.

Rule 62.00 Authority of Magistrates.

62.01: *Duties under 28 U.S.C. § 636(a).* A magistrate is authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and may:

(a) exercise all the powers and duties conferred or imposed upon United States commissioners by law and the Federal Rules of Criminal Procedure;
(b) administrator [administer] oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgements, affidavits, and depositions; and
(c) conduct extradition proceedings, in accordance with 18 U.S.C. § 3184.

62.02: *Disposition of Misdemeanor Cases — 18 U.S.C. § 3401.*
A magistrate may:

(a) try persons accused of, and sentence persons convicted of, misdemeanors committed within this district in accordance with 18 U.S.C. § 3401;
(b) direct the probation service of the court to conduct a presentence investigation in any misdemeanor case; and
(c) conduct a jury trial in any misdemeanor case where the defendant so requests and is entitled to trial by jury under the Constitution and laws of the United States.

62.03: *Determination of Non-Dispositive Pretrial Matters — 28 U.S.C. § 636(b)(1)(A).* A magistrate may hear and determine any procedural or discovery motion or other pretrial matter in a civil or criminal case, other than the motions which are specified in Local Rule 62.04.

62.04: *Recommendations Regarding Case-Dispositive Motions — 28 U.S.C. § 636(b)(1)(B).*

(a) A magistrate may submit to a judge a report containing proposed findings of fact and recommendations for disposition by the judge of the following pretrial motions in civil and criminal cases:
    1. Motions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions;
    2. Motions for judgment on the pleadings;
    3. Motions for summary judgment;
    4. Motions to dismiss or permit the maintenance of a class action;
    5. Motions to dismiss for failure to state a claim upon which relief may be granted;
    6. Motions to involuntarily dismiss an action;
    7. Motions for review of default judgments;

8. Motions to dismiss or quash an indictment or information made by a defendant; and
9. Motions to suppress evidence in a criminal case.

(b) A magistrate may determine any preliminary matters and conduct any necessary evidentiary hearing or other proceeding arising in the exercise of the authority conferred by this Local Rule 62.04.

62.05: *Prisoner Cases under 28 U.S.C. § 2254 and § 2255.* A magistrate may perform any or all of the duties imposed upon a judge by the rules governing proceedings in the United States district courts under 28 U.S.C. § 2254 and § 2255. In so doing, a magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for disposition of the petition by the judge. Any order disposing of the petition shall only be made by a judge.

62.06: *Prisoner Cases under 42 U.S.C. § 1983.* A magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for the disposition of petitions filed by prisoners challenging the conditions of their confinement.

62.07: *Special Master References.* A magistrate may be designated by a judge to serve as a special master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and Rule 53, F.R. Civ. P. Upon the consent of the parties, a magistrate may be designated by a judge to serve as a special master in any civil case, notwithstanding the limitations of Rule 53(b), F.R. Civ. P.

62.08: *Conduct of Trials and Disposition of Civil Cases upon Consent of the Parties — 28 U.S.C. § 636(c).* Subject to the provisions of Local Rule 21.00, a certified magistrate may conduct any or all proceedings in any civil case which is filed in this court, including the conduct of a jury or nonjury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. § 636(c). In the course of conducting such proceedings, a magistrate may hear and determine any and all pretrial and posttrial motions, including case-dispositive motions.

62.09: *Other Duties.* A magistrate is also authorized to:

(a) exercise general supervision of civil and criminal calendars, conduct calendar and status calls, and determine motions to expedite or postpone the trial of cases for the judges;
(b) conduct discovery conferences, pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings in civil and criminal cases;
(c) conduct arraignments in criminal cases not triable by the magistrate and take not guilty pleas in such cases;
(d) receive grand jury returns in accordance with Rule 6(f), F.R. Crim. P.;
(e) accept waivers of indictment, pursuant to Rule 7(b), F.R. Crim. P.;
(f) conduct voir dire and select petit juries for the court;
(g) accept petit jury verdicts in civil cases in the absence of a judge;
(h) conduct necessary proceedings leading to the potential revocation of probation;
(i) issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;
(j) order the exoneration or forfeiture of bonds;
(k) conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);

(l) conduct examinations of judgment debtors in accordance with Rule 69, F.R. Crim. P.;
(m) conduct proceedings for initial commitment of narcotics addicts under Title III of the Narcotic Addict Rehabilitation Act;
(n) perform the functions specified in 18 U.S.C. § 4107, § 4108 and § 4109, regarding proceedings for verification of consent by offenders to transfer to or from the United States and the appointment of counsel therein; and
(o) perform any additional duty as is not inconsistent with the Constitution and laws of the United States.

Rule 63.00 Review and Appeal.

63.01: *Appeal of Non-Dispositive Matters — 28 U.S.C. § 636(b)(1)(A).* Any party may appeal from a magistrate's order determining a motion or matter under Local Rule 62.03 within 10 days after issuance of the magistrate's order, unless a different time is prescribed by the magistrate or a judge. Such party shall file with the clerk, and serve on the magistrate and all parties, a written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto. A judge shall consider the appeal and shall set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law. The judge may also reconsider *sua sponte* any matter determined by a magistrate under this rule.

63.02: *Review of Case-Dispositive Motions and Prisoner Litigation — 28 U.S.C. § 636(b)(1)(B).* Any party may object to a magistrate's proposed findings, recommendations or report under Local Rules 62.04, 62.05 or 62.06, within 10 days after being served with a copy thereof. Such party shall file with the clerk, and serve on the magistrate and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Any party may respond to another party's objections within 10 days after being served with a copy thereof. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

63.03: *Special Master Reports — 28 U.S.C. § 636(b)(2).* Any party may seek review of, or action on, a special master report filed by a magistrate in accordance with the provisions of Rule 53(e), F.R. Civ. P.

63.04: *Appeal from Judgments in Misdemeanor Cases — 18 U.S.C. § 3402.* A defendant may appeal a judgment of conviction by a magistrate in a misdemeanor case by filing a notice of appeal and paying a $5.00 filing fee within 10 days after entry of the judgment, and by serving a copy of the notice upon the United States Attorney. The scope of appeal shall be the same as on an appeal from a judgment of the district court to the court of appeals.

63.05: *Appeal from Judgments in Civil Cases Disposed of on Consent of the Parties — 28 U.S.C. § 636(c).*

(a) *Appeal to the Court of Appeals.* Upon the entry of judgment in any civil case disposed of by a magistrate on consent of the parties under authority 28 U.S.C. § 636(c) and Local Rule 62.08, an aggrieved party shall appeal directly to the United States Court of Appeals for this circuit in the same manner as an appeal from any other judgment of this court.

(b) *Appeal to a District Judge.*

1. *Notice of Appeal.* In accordance with 28 U.S.C. § 636(c)(4), the parties may consent to appeal any judgment in civil case disposed of by a magistrate to a district judge, rather than directly to the Court of Appeals. In such case the appeal shall be taken by filing a notice of appeal with and paying a $5.00 filing fee to the clerk within 30 days after entry of the magistrate's judgment but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of entry of the judgment. For good cause shown, the magistrate or a judge may extend the time for filing the notice of appeal for an additional 20 days. A request for such extension, however, shall be made before the original time period for such appeal has expired. In the event a motion for a new trial is timely filed, the time for appeal from the judgment of the magistrate shall be extended to 30 days from the date of the ruling on the motion for a new trial, unless a different period is provided by the Federal Rules of Civil or Appellate Procedure.
2. *Service of the Notice of Appeal.* The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the appellant, or if a party is not represented by counsel to the party at his or her last known address.
3. *Record on Appeal.* The record on appeal to a judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate, if any. Every effort shall be made by the parties, counsel, and the court to minimize the production and costs of transcriptions of the record, and otherwise to render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. § 636(c)(4).
4. *Memoranda.* The appellant shall within 30 days of the filing of the notice of appeal file a typewritten memorandum together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his or her memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal.
5. *Disposition of the Appeal by a Judge.* The judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate's judgment, or remand with instructions for further proceedings. The judge shall accept the magistrate's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the magistrate to judge the credibility of the witnesses.

63.06: *Appeals from Other Orders of a Magistrate.* Appeals from any other decisions and orders of a magistrate not provided for in this Local Rule 63.00 should be taken as provided by governing statute, rule, or decisional law.

Rules 64.00 to 79.00: Reserved for future purposes.

V. Admiralty and Maritime Claims

Rule 80.00 Title and Scope.

These rules apply to admiralty and maritime claims within the meaning and contemplation of Rule 9(h), F.R. Civ. P. and remedies within Supplemental Rule A of the Supplemental Rules for Certain Admiralty and Maritime Claims, F.R. Civ. P. unless inconsistent therewith.

Rule 81.00 Return of Process.

(a) All process shall be issued by the clerk without order, except suits prosecuted in forma pauperis sought to be filed without prepayment of fees or costs or without security.

(b) Unless otherwise ordered by the court, all process from this court within the scope of Supplemental Rules C and D, F.R. Civ. P. shall be returnable (1) by claim within 10 days after execution of the process and by motion or answer within 20 days following claim, or (2) both claim and motion or answer within 30 days following execution of the process.

(c) Unless otherwise ordered by the court, Rule 9(h), F.R. Civ. P. process from this court in personam shall be by civil summons returnable 20 days after service of the process except process within the contemplation of Supplemental Rule B, F.R. Civ. P. which shall be in a conformity therewith.

(d) Whenever a vessel is to be served, the party seeking service shall inform the Marshal of the registry of the vessel to be served, provided, however, failure to so inform the Marshal shall not be cause for the Marshal to refuse to serve the said vessel or in any way invalidate service of said vessel.

Rule 82.00 Publication.

(a) Publication required by Supplemental Rule C(4), F.R. Civ. P. shall be made once, without further court order, in any one of the following newspapers:

Elizabeth City Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Wilmington Division:
Wilmington Morning Star, Wilmington, North Carolina
The News and Observer, Raleigh, North Carolina

All Other Divisions:
The News and Observer, Raleigh, North Carolina

(b) If the property arrested is not released within 10 days after execution of process, publication hereunder shall, unless otherwise ordered, be caused by the plaintiff or intervenor to be made within 17 days after execution of process.

(c) Such notice shall be substantially as follows, except and unless otherwise provided in actions for the enforcement of forfeitures for violation of any federal statute:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Caption of Case
NOTICE: The United States Marshal, Eastern District of North Carolina, has arrested the [(Vessel and appurtenances) (property)] in the above causes, civil and maritime for [nature of claim, i.e. contract, salvage, damage, collision, foreclosure of preferred mortgage, etc.] amounting to [$ (and nature of unliquidated items)]. Process returnable on [month, day and year, i.e. 30 days following execution of process as measured by Rule 6(a), F.R. Civ. P.] at the (name of courthouse), (city), (state), and any person claiming any interest therein must appear no later than that date and file written claims, answer or other defense, in person, or by attorney, or default and condemnation will be ordered.
DATED at [city of publication], (state), [month, day and year of publication].
[Name]
[Address]
[Attorney(s) for (Plaintiff) (Intervenor)]

(d) Plaintiff or intervenor will cause to be furnished to the Marshal, at the time process issues in Supplemental Rules B, C and D, F.R. Civ. P. actions, a prepared statement of attachment and garnishment or arrest with blanks for completion of date thereof and for signature below the name and title of such Marshal, together with self addressed envelope to plaintiff or plaintiff's attorney with sufficient postage affixed. The Marshal will promptly cause same to be completed and mailed after execution of process.

(e) Plaintiff shall effect publication required by Supplemental Rule F(4), F.R. Civ. P. without further court order, in any one of the following newspapers:

Elizabeth City Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Wilmington Division:
Wilmington Morning Star, Wilmington, North Carolina
The News and Observer, Raleigh, North Carolina

All Other Divisions:
The News and Observer, Raleigh, North Carolina

(f) Whenever publication is required by Supplemental Rules C(4) and F(4), F.R. Civ. P. plaintiff or intervenor shall cause to be filed with the clerk, not later than the return date, sworn proof of publication by or on behalf of the publisher or the editor in charge of legal notices of the newspaper in which published, together with a copy of the proof of publication, or publication or reproduction thereof.

Rule 83.00 Publication of Notice of Sale.

Notice of sale of property in suits in rem and quasi in rem, except in suits on behalf of the United States where other notice is prescribed by statute, shall be caused by the Marshal to be published in any one of the newspapers set forth in Local Rule 82.00(a) and published at least twice, the first publication to be at least 1 calendar week prior to date of sale and the second publication to be at least 3 calendar days prior to date of sale, unless otherwise ordered by the court.

Rule 84.00 Stipulations for Costs and Security.

(a) In actions where there is sought, in whole or in part, a remedy listed in Supplemental Rule A of the Supplemental Rules For Certain Admiralty and Maritime Claims, F.R. Civ. P., no initial pleading seeking such remedy, or claim pursuant to supplemental Rule F(5), F.R. Civ. P. shall be filed unless the party offering the same shall first file a stipulation for costs in the sum of $250.00, or in case 2 or more vessels are jointly or severally proceeded against, a sum equal to $250.00 per vessel, conditioned that the principal shall pay all costs and expenses awarded against the principal by any interlocutory order or final judgment, or on appeal. In all other admiralty and maritime actions, no initial complaint, whether original or interlocutory, shall be filed by any party, unless the party offering the same shall first file a stipulation for costs in the sum of $100.00, conditioned that the principal shall pay all costs and expenses awarded against the principal by any interlocutory order or final judgment, or on appeal. All stipulations shall be with at least 1 surety resident in this district. Any incorporated surety company duly authorized to do business in this district may be accepted as such surety. In the place of the stipulation for costs with surety, a party may deposit the necessary amount in the registry of the court accompanied by a statement conditioned as above, referring to such deposited amount.

(b) Seamen suing as provided in 28 U.S.C. § 1916 shall not be required to file a stipulation for costs in the first instance. The court may however, order a stipulation to be given at any time.

(c) At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater, better or lesser security; and any such order may be enforced by attachment or otherwise.

(d) At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater or better costs security; and any such order may be enforced by attachment or otherwise. The court may enter such order on its own motion, with or without notice.

(e) In all actions in rem brought by seamen in their own names and for their own benefit for wages, salvage, or the enforcement of laws for their health or safety without prepaying costs or fees or furnishing security therefor, pursuant to 28 U.S.C. § 1916, the Marshal may at any time after service of process, attachment, or seizure of a vessel, petition any judge or magistrate of this court to require the posting of security for any or all reasonable expenses which have been or may be incurred while the vessel is in the custody of the Marshal. Upon filing such petition for the posting of security, a hearing date shall promptly be set by the court and the Marshal shall give notice of the time and place of such hearing by serving a copy of the notice of hearing together with a copy of the petition upon counsel of record for the parties or upon the parties, and by posting a copy of same on the vessel.

Rule 85.00 Form of Stipulations.

Except in cases instituted by the United States by information, or complaint of information upon seizures for any breach of the revenue, navigation, or other laws of the United States, stipulations or bonds in admiralty and maritime actions need not be under seal and may be executed by the agent or counsel of the stipulator or obligor. Stipulations for costs with corporate surety need not be signed or executed by the party, but may be signed by its agent or counsel, and shall be sufficient in any event if executed only by the surety approved by the court.

Rule 86.00 Pleadings and Parties.

(a) Every complaint filed as a Rule 9(h), F.R. Civ. P. action shall set forth "In Admiralty" following the designation of the court, in addition to the statement, if any, contained in the body of the complaint pursuant to such rule.

(b) In actions under Supplemental Rules B, C or D, F.R. Civ. P. the business telephone number and address of the plaintiff's counsel or the plaintiff, if plaintiff appears *pro se,* shall be included.

(c) Every complaint in Supplemental Rules B and C, F.R. Civ. P. actions shall state the amount of the debt, damages, or salvage for which the action is brought, and shall include in addition thereto the amount of any claim for unliquidated items claims, including attorneys fees.

(d) In cases of salvage, the complaint shall also state to the extent known or estimate the value of the hull, cargo, freight and other property salved, the amount claimed, the names of the principal salvors, and that the suit is instituted in their behalf and in behalf of all other persons interested or associated with them. There shall also be attached to the complaint a list of all known salvors and all persons believed entitled to share in the salvage, and also any agreement of consortship available and known to exist among them or any of them, including a copy of any such agreement.

Rule 87.00 Verification of Pleadings and Answers to Interrogatories.

Every complaint and claim in Supplemental Rules B, C and D, F.R. Civ. P. actions shall be verified on oath or solemn affirmation by a party, or an officer of a corporate party. If no party or corporate officer is within the district, verification of a complaint, claim or answers to interrogatories may be made by an agent, attorney-in-fact or attorney of record, who shall state briefly the sources of his or her knowledge, information and belief, declare that the document affirmed is true to the best of his or her knowledge, information and belief, state the reason why verification is not made by the party or a corporate officer, and that he or she is authorized so to act. Any such verification will be deemed to have been made by the party to whom a document might apply as if verified personally. Any interested party may move the court, with or without a request for stay, for the personal oath of a party or all parties, or that of a corporate officer. If required by the court, such verification shall be procured by commission or as otherwise ordered.

Rule 88.00 Intervention.

(a) Whenever a vessel or other property is seized, attached or arrested in a proceeding and said property is in the hands of the Marshal, anyone having a claim against the vessel or property is required to present the same by intervening complaint filed in the case and not by way of original complaint, unless otherwise ordered by the court. Upon the filing of each such intervening complaint, the clerk [or, counsel who files same] shall forthwith deliver a conformed copy thereof to the Marshal who shall thereupon post such copy on the vessel or property, but the Marshal need not rearrest or reattach the vessel or property. Counsel for intervening parties are required to ascertain the names and addresses of other counsel of record in the proceedings at the time of the filing of an intervening complaint and forthwith to serve a copy of the intervening complaint, including any exhibits attached to the original thereof, upon such other counsel and shall thereafter file a certificate with the clerk setting forth the names and addresses of counsel served, method of service and the date thereof.

(b) Subject to other rules of this court, any party is permitted to intervene without the filing of a motion or petition to intervene in any proceeding filed pursuant to Rule 9(h), F.R. Civ. P. where a vessel or other property has been arrested or attached and is in the hands of the Marshal, except that no party is permitted to intervene in any such proceeding without first obtaining leave of court if intervention is sought within 15 days prior to the date for which a sale of the vessel or property has been set by the court. If intervention is sought within said 15 day period by any party, that party is required to file a motion or petition to intervene and to serve copies thereof along with any exhibits or documents relied upon in support of such intervenors' claims and request for intervention, upon all counsel of record. In such circumstances the court may allow intervention upon such terms and conditions which it considers equitable to the interests of all parties involved.

(c) Following an initial attachment, arrest or seizure, any party intervening in a proceeding alleging a claim against the property is required to deposit funds for the safekeeping of the property with the Marshal upon the filing of such intervening claim or complaint. Unless the court otherwise orders for good cause shown, the deposit is to be in an amount determined by the Marshal.

Rule 89.00 Appraisement and Appraisers and Other Matters.

(a) Order for appraisement of property under arrest or attachment, or of plaintiff's interest in the vessel and pending freight under Supplemental Rule F(7), F.R. Civ. P. shall issue only upon motion and notice pursuant to Rule 7(b), F.R. Civ. P. or upon consent of the attorneys for the respective parties. Before executing their trust, appraisers shall be sworn or affirmed to faithful discharge thereof before the clerk or a deputy clerk. The appraisement shall be returned to the clerk and the clerk shall give notice of the return to the parties or their attorneys. Any party, on notice, may appeal the appraisement instanter to the court. After return of the appraisement, the court, on notice and hearing, shall determine the value of the property under arrest or attachment or the value of plaintiff's interest in the vessel and pending freight. For their services, appraisers shall be paid fees, as ordered by the court, by the party at whose instance the appraisal was ordered. Appraiser's fees shall thereafter be taxed as the court orders.

(b) All other maritime procedures and remedies such as motions for appointment of substitute custodians and like matters are left to be handled by an originating motion pursuant to Rule 7(b), F.R. Civ. P., on such notice as the exigencies of the circumstances may require.

Rule 90.00 Release of Seizures — Custodial Cost — General Bonds.

(a) Property seized by the Marshal may be released as follows:

(1) By the Marshal upon the receipt of security by the Marshal, accompanied by the endorsed express authorization for release signed by the party or counsel for the party as provided by Supplemental Rule E(5)(c), F.R. Civ. P. if all costs and charges of the court and its officers shall have first been paid. Moneys received as part of any cash stipulation shall be delivered by the Marshal to the clerk for deposit in the registry of the court.

(2) In action entirely for a sum certain, by paying into the court the amount alleged in the complaint to be due, with interest at 6 percent per annum thereon from the date claimed to be due to a date 24 months after the date the claim was filed, or by filing an approved stipulation for such alleged amount and interest. In either event, claim of the property shall be filed.

(3) In actions other than possessory, petitory, and partition, by filing, in addition to a claim of the property, an approved stipulation for the amount of the appraised or agreed value of the property seized, with interest (unless otherwise ordered by the court), interlocutory or final, and to pay the amount awarded by the final decree rendered by this court or by any appellate court, with interest.

(4) In possessory, petitory, and partition actions, only upon the order of the court, and on such security and terms as ordered.

(5) Upon the dismissal or discontinuance of the action or upon the written consent of the attorney for the party on whose behalf the property is detained, if all costs and charges of the court and its officers shall have first been paid.

(b) The Marshal shall not deliver any property so released until costs and charges of the Marshal shall first have been paid.

(c) In any general bond as provided for by Supplemental Rule E(5)(b) F.R. Civ. P. the vessel will be identified by name, nationality, dimensions, official number or registration number, hailing port and port of documentation, to the extent applicable. The owner of such vessel shall also file complete designated United States address for communications to the owner or designated agent, which shall be by mail. Execution of process against the vessel so stayed under Supplemental Rule E(5)(b), F.R. Civ. P. shall be endorsed to the Marshal as stayed pursuant to the rule. Such process shall be served by the Marshal together with a copy of the complaint on the master or other person in whose charge or custody the vessel is found and the Marshal shall make his or her return thereof. If no master or other person in charge of custody is found aboard the vessel, the Marshal shall so make his or her return accordingly, and the clerk shall advise by mail the owner or designated agent, at the address furnished pursuant to this rule, of the nature of the action, any amount claimed, the plaintiff, the name and address of plaintiff's attorney, the case number, and the return day 30 days from the date of the Marshal's attempt. The clerk will maintain a current list of vessels subject to a general bond and file said bonds alphabetically by name of vessel and endorsed as provided by Supplemental Rule E(5)(b), F.R. Civ. P.

Rule 91.00 Taxation as Costs.

If costs shall be awarded to either or any party, then the reasonable premium or expense paid on all bonds or stipulations or other security by the party in whose favor such costs are allowed shall be taxed as a part of the costs of the case. In addition thereto, if costs shall be awarded to either or any party, then the reasonable expenses paid by a party incidental to or arising out of the attachment or arrest of any property in the proceedings or while said property is "in custodia legis" shall be taxed as a part of the costs of the case.

Rule 92.00 Stay of Execution or of Release of Property After Judgment or Dismissal.

No execution of judgment shall issue nor shall seized property be released pursuant to judgment or order of dismissal, until 10 days after its entry. Upon the filing of a motion for new trial or notice of appeal or motion to set aside default within said 10 day period, a further stay shall exist for a period not to exceed 30 days from the entry of judgment or dismissal to permit the entry of an order fixing the amount of a supersedeas bond and the filing of same.

Rule 93.00 Possessory Actions — Short Day Return.

In all possessory actions upon special order of the court, process may be made returnable upon a short day. The answer shall be filed within such time as may be specifically ordered by the court, and a day of hearing then fixed, unless otherwise ordered. The hearing of possessory suits shall be given preference.

Rule 94.00 Claims After Sale, How Limited.

Claims upon the proceeds of sale of property under a final decree, except for seamen's wages, shall not be admitted in behalf of lienors who file their claims after the sale, to the prejudice of lienors who filed their claims before the sale, but shall be limited to remnants and surplus, unless for cause shown it shall be otherwise ordered.

Rules 95.00 to 99.00: Reserved for future purposes.

Appendix A

Plan for Achieving Prompt Disposition of Criminal Cases for the Eastern District of North Carolina — Statement of Time Limits and Procedures

Preamble
As required by the Speedy Trial Act of 1974 and the Speedy Trial Act Amendments Act of 1979, the judges of the United States District Court for the Eastern District of North Carolina adopt the following time limits and procedures to minimize undue delay and to further the prompt disposition of criminal cases and certain juvenile proceedings.

Time Limits Adopted by the Court

1. Applicability.

(a) *Offenses.* The time limits set forth herein are applicable to all criminal offenses triable in this court,* including cases triable by United States magistrates, except for petty offenses as defined in 18 U.S.C. § 1(3). Except as specifically provided, they are not applicable to proceedings under the Federal Juvenile Delinquency Act. [§ 3172]

(b) *Persons.* The time limits are applicable to persons accused who have not been indicted or informed against as well as those who have, and the word "defendant" includes such persons unless the context indicates otherwise.

2. Priorities in Scheduling Criminal Cases.

Preference shall be given to criminal proceedings as far as practicable as required by Rule 50(a) of the Federal Rules of Criminal Procedure. The trial of defendants in custody solely because they are awaiting trial and of high-risk defendants as defined in section 5 should be given preference over other criminal cases. [§ 3164(a)]

3. Time within Which an Indictment or Information Must Be Filed.

(a) *Time Limits.* If an individual is arrested or served with a summons and the complaint charges an offense to be prosecuted in this district, any indictment or information subsequently filed in connection with such charge shall be filed within 30 days of arrest or service. [§ 3161(b)]

* (b) *Grand Jury Not in Session.* If the defendant is charged with a felony to be prosecuted in this district, and no grand jury in the district has been in session during the 30-day period prescribed in subsection (a), such period shall be extended an additional 30 days. [§ 3161(b)]

(c) *Measurement of Time Periods.* If a person has not been arrested or served with a summons on a Federal charge, an arrest will be deemed to have been made at such time as the person (i) is held in custody solely for the purpose of responding to a Federal charge; (ii) is delivered to the custody of a Federal official in connection with a Federal charge; or (iii) appears before a judicial officer in connection with a Federal charge.

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*18 U.S.C. § 3172 defines offense as "any Federal criminal offense which is in violation of any Act of Congress ...." The district courts with jurisdiction over offenses created by other legislatures will wish to consider the extent to which Speedy Trial Act standards should be applied to trials for such offenses.

*This subsection should be excluded in districts in which there is no likelihood of its coming into play.

(d) *Related Procedures.*

(1) At the time of the earliest appearance before a judicial officer of a person who has been arrested for an offense not charged in an indictment or information, the judicial officer shall establish for the record the date on which the arrest took place.

(2) In the absence of a showing to the contrary, a summons shall be considered to have been served on the date of service shown on the return thereof.

4. Time within Which Trial Must Commence.

(a) *Time Limits.* The trial of a defendant shall commence not later than 70 days after the last to occur of the following dates:

(1) The date on which an indictment or information is filed in this district;

(2) The date on which a sealed indictment or information is unsealed; or

(3) The date of the defendant's first appearance before a judicial officer of this district. [§ 3161(c)(1)]

(b) *Retrial; Trial after Reinstatement of an Indictment or Information.* The retrial of a defendant shall commence within 70 days from the date the order occasioning the retrial becomes final, as shall the trial of a defendant, upon an indictment or information dismissed by a trial court and reinstated following an appeal. If the retrial or trial follows an appeal or collateral attack, the court may extend the period if unavailability of witnesses or other factors resulting from passage of time make trial within 70 days impractical. The extended period shall not exceed 180 days. [§§ 3164(d)(2), (e)]

(c) *Withdrawal of Plea.* If a defendant enters a plea of guilty or nolo contendere to any or all charges in an indictment or information and is subsequently permitted to withdraw it, the time limit shall be determined for all counts as if the indictment or information were filed on the day the order permitting withdrawal of the plea became final. [§ 3161(i)]

(d) *Superseding Charges.* If, after an indictment or information has been filed, a complaint, indictment, or information is filed which charges the defendant with the same offense or with an offense required to be joined with that offense, the time limit applicable to the subsequent charge will be determined as follows:

(1) If the original indictment or information was dismissed on motion of the defendant before the filing of the subsequent charge, the time limit shall be determined without regard to the existence of the original charge. [§ 3161(d)(1)]

(2) If the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence with the time limit for commencement of trial on the original indictment or information. [§ 3161(h)(6)]

(3) If the original indictment or information was dismissed on motion of the United States attorney before the filing of the subsequent charge, the trial shall commence within the time limit for commencement of trial on the original indictment or information, but the period during which the defendant was not under charges shall be excluded from the computations. Such period is the period between the dismissal of the original indictment or information and the date the time would

have commenced to run on the subsequent charge had there been no previous charge.* [§ 3161(h)(6)]

If the subsequent charge is contained in a complaint, the formal time limit within which an indictment or information must be obtained on the charge shall be determined without regard to the existence of the original indictment or information, but earlier action may in fact be required if the time limit for commencement of trial is to be satisfied.

(e) *Measurement of Time Periods.* For the purposes of this section:

(1) If a defendant signs a written consent to be tried before a magistrate and no indictment or information charging the offense has been filed, the time limit shall run from the date of such consent.

(2) In the event of a transfer to this district under Rule 20 of the Federal Rules of Criminal Procedure, the indictment or information shall be deemed filed in this district when the papers in the proceeding or certified copies thereof are received by the clerk.

(3) A trial in a jury case shall be deemed to commence at the beginning of voir dire.

(4) A trial in a non-jury case shall be deemed to commence on the day the case is called, provided that some step in the trial procedure immediately follows.

(f) *Related Procedures.*

(1) At the time of the defendant's earliest appearance before a judicial officer of this district, the officer will take appropriate steps to assure that the defendant is represented by counsel and shall appoint counsel where appropriate under the Criminal Justice Act and Rule 44 of the Federal Rules of Criminal Procedure.

(2) The court shall have sole responsibility for setting cases for trial after consultation with counsel. At the time of arraignment or as soon thereafter as is practicable, each case will be set for trial on a day certain or listed for trial on a weekly or other short-term calendar. [§ 3161(a)]

(3) Individual calendars shall be managed so that it will reasonably anticipate that every criminal case set for trial will be reached during the week of original setting. A conflict in schedules of Assistant United States Attorneys or defense counsel will be ground for a continuance or delayed setting only if approved by the court and called to the court's attention at the earliest practicable time.

(4) In the event that a complaint, indictment, or information is filed against a defendant charged in a pending indictment or information or in an indictment or information dismissed on motion of the United States Attorney, the trial on the new charge shall commence within the time limit for commencement of trial on the original indictment or information unless the court finds that the new charge is not for the same offense charged in the original indictment or information or an offense required to be joined therewith.

(5) At the time of the filing of a complaint, indictment, or information described in paragraph (4), the United States Attorney shall give written notice to the court of that circumstance and of his position with respect to the computation of the time limits.

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*Under the rule of this paragraph, if an indictment was dismissed on motion of the prosecutor on May 1, with 20 days remaining within which trial must be commenced, and the defendant was arrested on a new complaint on June 1, the time remaining for trial would be 20 days from June 1: the time limit would be based on the original indictment, but the period from the dismissal to the new arrest would not count. Although the 30-day arrest-to-indictment time limit would apply to the new arrest as a formal matter, the short deadline for trial would necessitate earlier grand jury action.

(6) All pretrial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket.

5. Defendants in Custody and High-Risk Defendants.*

(a) *Time Limits.* Notwithstanding any longer time periods that may be permitted under sections 3 and 4, the following time limits will also be applicable to defendants in custody and high-risk defendants as herein defined:

(1) The trial of a defendant held in custody solely for the purpose of trial on a Federal charge shall commence within 90 days following the beginning of continuous custody.

(2) The trial of a high-risk defendant shall commence within 90 days of the designation as high-risk. [§ 3164(b)]

(b) *Definition of "High-Risk Defendant."* A high-risk defendant is one reasonably designated by the United States Attorney as posing a danger to himself or any other person or to the community.

(c) *Measurement of Time Periods.* For the purposes of this section:

(1) A defendant is deemed to be in detention awaiting trial when he is arrested on a Federal charge or otherwise held for the purpose of responding to a Federal charge. Detention is deemed to be solely because the defendant is awaiting trial unless the person exercising custodial authority has an independent basis (not including a detainer) for continuing to hold defendant.

(2) If the case is transferred pursuant to Rule 20 of the Federal Rules of Criminal Procedure and the defendant subsequently rejects disposition under Rule 20 or the court declines to accept the plea, a new period of continuous detention awaiting trial will begin at that time.

(3) A trial shall be deemed to commence as provided in sections 4(e)(3) and 4(e)(4).

(d) *Related Procedures.*

(1) If a defendant is being held in custody solely for the purpose of awaiting trial, the United States Attorney shall advise the court at the earliest practicable time of the date of the beginning of such custody.

(2) The United States Attorney shall advise the court at the earliest practicable time (usually at the hearing with respect to bail) if the defendant is considered by him to be high risk.

(3) If the court finds that the filing of a "high-risk" designation as a public record may result in prejudice to the defendant, it may order the designation sealed for such period as is necessary to protect the defendant's right to a fair trial, but not beyond the time that the court's judgment in the case becomes final. During the time the designation is under seal, it shall not be made known to other persons without the permission of the court.

6. Exclusion of Time from Computations.

(a) *Applicability.* In computing any time limit under section 3, 4, or 5, the periods of delay set forth in 18 U.S.C. § 3161(h) shall be excluded. Such periods of delay shall not be excluded in computing the minimum period for commencement of trial under section 7.

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*If a defendant's presence has been obtained through the filing of a detainer with state authorities, the Interstate Agreement on Detainers, 18 U.S.C., Appendix, may require that trial commence before the deadline established by the Speedy Trial Act. See U.S. v. Mauro, 436 U.S. 340, 356-57 n.24 (1978).

(b) *Records of Excludable Time.* The clerk of the court shall enter on the docket, in the form prescribed by the Administrative Office of the United States Courts, information with respect to excludable periods of time for each criminal defendant. With respect to proceedings prior to the filing of an indictment or information, excludable time shall be reported to the clerk by the United States Attorney.

(c) *Stipulations.*

(1) The attorney for the government and the attorney for the defendant may at any time enter into stipulations with respect to the accuracy of the docket entries recording excludable time.

(2) To the extent that the amount of time stipulated by the parties does not exceed the amount recorded on the docket for any excludable period of delay, the stipulation shall be conclusive as between the parties unless it has no basis in fact or law. It shall similarly be conclusive as to a codefendant for the limited purpose of determining, under 18 U.S.C. § 3161(h)(7), whether time has run against the defendant entering into the stipulation.

(3) To the extent that the amount of time stipulated exceeds the amount recorded on the docket, the stipulation shall not have effect unless approved by the court.

(d) *Pre-Indictment Procedures.*

(1) In the event that the United States Attorney anticipates that an indictment or information will not be filed within the time limit set forth in section 3, he may file a written motion with the court for a determination of excludable time. In the event that the United States Attorney seeks a continuance under 18 U.S.C. § 3161(h)(8), he shall file a written motion with the court requesting such a continuance.

(2) The motion of the United States Attorney shall state (i) the period of time proposed for exclusion, and (ii) the basis of the proposed exclusion. If the motion is for a continuance under 18 U.S.C. § 3161(h)(8), it shall also state whether or not the defendant is being held in custody on the basis of the complaint. In appropriate circumstances, the motion may include a request that some or all of the supporting material be considered *ex parte* and *in camera.*

(3) The court may grant a continuance under 18 U.S.C. § 3161(h)(8) for either a specific period of time or a period to be determined by reference to an event (such as recovery from illness) not within the control of the government. If the continuance is to a date not certain, the court shall require one or both parties to inform the court promptly when and if the circumstances that justify the continuance no longer exist. In addition, the court shall require one or both parties to file periodic reports bearing on the continued existence of such circumstances. The court shall determine the frequency of such reports in the light of the facts of the particular case.

(e) *Post-Indictment Procedures.*

(1) At each appearance of counsel before the court, counsel shall examine the clerk's records of excludable time for completeness and accuracy and shall bring to the court's immediate attention any claim that the clerk's record is in any way incorrect.

(2) In the event that the court continues a trial beyond the time limit set forth in section 4 or 5, the court shall determine whether the limit may be recomputed by excluding time pursuant to 18 U.S.C. § 3161(h).

(3) If it is determined that a continuance is justified, the court shall set forth its findings in the record, either orally or in writing. If the continuance is granted under 18 U.S.C. § 3161(h)(8), the court shall

also set forth its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial. If the continuance is to a date not certain, the court shall require one or both parties to inform the court promptly when and if the circumstances that justify the continuance no longer exist. In addition, the court shall require one or both parties to file periodic reports bearing on the continued existence of such circumstances. The court shall determine the frequency of such reports in the light of the facts of the particular case.

7. Minimum Period for Defense Preparation.

Unless the defendant consents in writing to the contrary, the trial shall not commence earlier than 30 days from the date on which the indictment or information is filed or, if later, from the date on which counsel first enters an appearance or on which the defendant expressly waives counsel and elects to proceed *pro se*. In circumstances in which the 70-day time limit for commencing trial on a charge in an indictment or information is determined by reference to an earlier indictment or information pursuant to section 4(d), the 30-day minimum period shall also be determined by reference to the earlier indictment or information. When prosecution is resumed on an original indictment or information following a mistrial, appeal, or withdrawal of a guilty plea, a new 30-day minimum period will not begin to run. The court will in all cases schedule trials so as to permit defense counsel adequate preparation time in the light of all circumstances. [§ 3161(c)(2)]

8. Time within Which Defendant Should Be Sentenced.

*(a) *Time Limit.* A defendant shall ordinarily be sentenced within 45 days of the date of his conviction or plea of guilty or nolo contendere.

(b) *Related Procedures.* If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.

9. Juvenile Proceedings.

(a) *Time within Which Trial Must Commence.* An alleged delinquent who is in detention pending trial shall be brought to trial within 30 days of the date on which such detention was begun, as provided in 18 U.S.C. § 5036.

(b) *Time of Dispositional Hearing.* If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than 20 court days after trial, unless the court has ordered further study of the juvenile in accordance with 18 U.S.C. § 5037(c).

10. Sanctions.

(a) *Dismissal or Release from Custody.* Failure to comply with the requirements of Title I of the Speedy Trial Act may entitle the defendant to dismissal of the charges against him or to release from pretrial custody. Nothing in this plan shall be construed to require that a case be dismissed or a defendant released from custody in circumstances in which such action would not be required by 18 U.S.C. §§ 3162 and 3164.*

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*The Speedy Trial Act does not establish time limits governing the period between conviction and sentencing, but the district courts may wish to do so. The time limit set forth in brackets in this section is a suggested limit, and not a maximum permissible limit.

(b) *High-Risk Defendants.* A high-risk defendant whose trial has not commenced within the time set forth in 18 U.S.C. § 3164(b) shall, if the failure to commence trial was through no fault of the attorney for the government, have his release conditions automatically reviewed. A high-risk defendant who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under Chapter 207 of Title 18, U.S.C., to ensure that he shall appear at trial as required. [§ 3164(c)]

(c) *Discipline of Attorneys.* In a case in which counsel (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial, (2) files a motion solely for the purpose of delay which he knows is frivolous and without merit, (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of the continuance, or (4) otherwise willfully fails to proceed to trial without justification consistent with 18 U.S.C. § 3161, the court may punish such counsel as provided in 18 U.S.C. §§ 3162(b) and (c).

(d) *Alleged Juvenile Delinquents.* An alleged delinquent in custody whose trial has not commenced within the time limit set forth in 18 U.S.C. § 5306 shall be entitled to dismissal of his case pursuant to that section unless the Attorney General shows that the delay was consented to or caused by the juvenile or his counsel, or would be in the interest of justice in the particular case.

11. Persons Serving Terms of Imprisonment.

If the United States Attorney knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly seek to obtain the presence of the prisoner for trial, or cause a detainer to be filed, in accordance with the provisions of 18 U.S.C. § 3161(j).

12. Effective Dates.

(a) The amendments to the Speedy Trial Act made by Public Law 96-43 became effective August 2, 1979. To the extent that this revision of the district's plan does more than merely reflect the amendments, the revised plan shall take effect upon approval of the reviewing panel designated in accordance with 18 U.S.C. § 3165(c). However, the dismissal sanction and the sanctions against attorneys authorized by 18 U.S.C. § 3162 and reflected in sections 10(a) and (c) of this plan shall apply only to defendants whose cases are commenced by arrest or summons on or after July 1, 1980,* and to indictments and informations filed on or after that date.

(b) If a defendant was arrested or served with a summons before July 1, 1979, the time within which an information or indictment must be filed shall be determined under the plan that was in effect at the time of such arrest or service.

(c) If a defendant was arraigned before August 2, 1979, the time within which the trial must commence shall be determined under the plan that was in effect at the time of such arraignment.

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*Dismissal may also be required in some cases under the Interstate Agreement on Detainers, 18 U.S.C., Appendix.

*This date should be advanced if sanctions are to be implemented earlier pursuant to 18 U.S.C. § 3174(c).

(d) If a defendant was in custody on August 2, 1979, solely because he was awaiting trial, the 90-day period under section 5 shall be computed from that date.

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RULES OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Rules of Court

Adopted December 1, 1983.

In Re:
Local Bankruptcy Rules ORDER

It appearing that local bankruptcy rules would facilitate the administration of bankruptcy cases in this district, and would assist the court in the management of contested matters and adversary proceedings; and

It further appearing that Bankruptcy Rule 9029 authorizes the promulgation of local bankruptcy rules not inconsistent with the official Bankruptcy Rules; now therefore,

IT IS ORDERED that the bankruptcy rules attached hereto are hereby adopted and shall be referred to as Local Bankruptcy Rules, EDNC, and shall be numbered in such a way as to refer to the official Bankruptcy Rules.

Entered this first day of December, 1983.

s/Thomas M. Moore
Judge

s/A. Thomas Small
Judge

PREFACE

The local bankruptcy rules for the United States Bankruptcy Court for the Eastern District of North Carolina are adopted to facilitate the administration of bankruptcy cases, to assist the court in the management of contested matters and adversary proceedings and to provide for variations in the local practice in this court.

The numbering system for the local bankruptcy rules is patterned after the bankruptcy rules which became effective August 1, 1983. Each local rule is keyed to an appropriate bankruptcy rule number and is numbered with a decimal to such bankruptcy rule number. For example, a local rule relating to Bankruptcy Rule 7001 will be numbered as Local Bankruptcy Rule No. 7001.1. This numbering system should facilitate the use of the local rules.

The local bankruptcy rules will be cited as: "Local Bankruptcy Rule No. __ , EDNC".

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Rule 1002.1

Voluntary Petition

Bankruptcy Rule 1002(b)(1) is amended to read that the required number of copies of petitions requesting relief under chapters 7 and 13 of the Code is as follows:

(1) Chapter 7 — original and two copies
(2) Chapter 13 — original and three copies

Rule 1006.1

Filing Fees

(1) An application for permission to pay the filing fees in installments shall contain the following:

- (a) reasons why the debtor cannot pay the full fee at the time of filing;
- (b) a statement that the debtor's attorney has received no payment for fees and will accept none until the filing fees are paid in full;
- (c) a statement that the debtor does not owe any outstanding fees to the Court on account of any other prior case;
- (d) signature of both the debtor and the debtor's attorney.

(2) Following the filing of a petition and an application, each application will be reviewed by the Court and an order entered granting or denying the application. Should the application be denied, the debtor shall have ten (10) days from the date of the order to pay the full fee. If the full fee is not paid within ten (10) days of the order, the petition will be dismissed by the Court without any further prior notice.

(3) Final installments of the filing fee shall be paid within ten (10) days following the date first set for the meeting of creditors called pursuant to 11 U.S.C. § 341, unless otherwise ordered by the Court upon appropriate motion for extension and for cause shown.

(4) The debtor and the debtor's attorney are responsible for knowing the dates the payments are due. No reminders will be provided from the Court of the due date. Upon failure to make any payment as scheduled, the petition is subject to dismissal after hearing on notice to the debtor and trustee.

(5) In chapter 13 cases, filing fees must be paid directly to the clerk and may not be paid through the standing trustee, whether the payments are full or installments, unless otherwise ordered by the Court upon motion and for cause shown.

Rule 1007.1

Lists, Schedules and Statements; Time Limits

A petition requesting relief under chapters 7, 11 or 13 shall be accompanied by a mailing matrix containing the complete mailing address, including zip code, for the following:

(1) each debtor
(2) attorney for the debtor
(3) all creditors listed in the petition, alphabetically arranged
(4) Internal Revenue Service, 320 Federal Place, Greensboro, North Carolina 27402 (ATTN: Special Procedures Staff) — except in chapters 7 and 13 when the IRS is *not* listed as a creditor
(5) North Carolina Department of Revenue, Post Office Box 25000, Raleigh, North Carolina 27640 — except in chapters 7 and 13 when the Department of Revenue is *not* listed as a creditor
(6) Employment Security Commission, Post Office Box 25903, Raleigh North Carolina 27611 — except in chapters 7 and 13 when the ESC is *not* listed as a creditor.
(7) If the United States is a party, other than for taxes, the matrix should include the United States Attorney, Post Office Box 26897, Raleigh, North Carolina 27611. (EXAMPLE: FHA, FmHA, VA, SBA)

The matrix shall be prepared so as to be suitably reproduced photographically on pre-gummed labels and shall be certified as accurate by the filing attorney or party. Such party shall be responsible for any errors in or omissions from the listings.

Rule 1007.2

Bankruptcy Case Cover Sheet

A petition requesting relief under chapters 7, 11 or 13 shall be accompanied by a Bankruptcy Case Cover Sheet conforming substantially to Local Form No. 1 contained in these rules, which has been completed fully by the debtor from the information contained in the schedules.

Rule 1009.1

Amendment of Voluntary Petition, Lists, Schedules and Statement of Financial Affairs

Any amendment to a petition, list, schedule or statement shall be accompanied by a certificate of service in the form of a statement of the date and manner of service and of the names and addresses of the persons served and certified by the person making the service. The clerk shall not accept such amendment for filing without such certificate.

PART II Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants

Rule 2003.1

Meeting of Creditors or Equity Security Holders

The clerk shall retain and preserve the taped recordings of the meetings of creditors required by Section 341 of the Code for a period of six (6) months from the date of said meeting. After the expiration of six (6) months from said date, the clerk is authorized to erase or otherwise destroy the aforementioned taped recordings.

Rule 2015.1

Duty of Trustee or Debtor in Possession to Keep Records, Make Reports, and Give Notice of Case

The standing chapter 13 trustees are authorized to charge a two dollar ($2) search fee when answering inquiries which require a search of the records for each name or item searched in accordance with 28 U.S.C. § 1930(c), and to use the same as a part of operating expenses. Said trustees shall account to the Court for funds so collected.

Rule 2015.2

Duty of Chapter 7 Trustee to Give Notice

The chapter 7 trustees shall prepare and mail notices as follows:

(1) Notices of sale as provided in Bankruptcy Rule 6004 and setting the time for filing objections to any sale to within at least fifteen (15) days of the date of the mailing of said notice.

(2) Notice of hearing on the final account (final meeting) in a chapter 7 case if the net proceeds realized exceed $250.

The chapter 7 trustee shall prepare and file with the clerk a certificate of service showing when and to whom such notices were mailed within three (3) days thereafter.

Rule 2016.1

Filing of Attorney Fee Disclosure Statement

The disclosure of attorney compensation required by 11 U.S.C. § 329 must be filed with the Court within fifteen (15) days of the date of the filing of the original petition.

PART III Claims and Distribution to Creditors and Equity Interest Holders; Plans

Rule 3002.1

Filing Proof of Claim or Interest

(1) In chapters 7 and 11 cases, all claims shall be filed with the clerk in accordance with Bankruptcy Rule 5005.
(2) In chapter 13 cases, all claims shall be filed with the standing chapter 13 trustee as provided in Local Bankruptcy Rule No. 5005.1, EDNC.

Rule 3003.1

Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases

The debtor shall notify each creditor whose claim is listed in the petition as contingent, disputed, or unliquidated of that fact within fifteen (15) days after filing the schedule of assets and liabilities or within fifteen (15) days after addition of such creditors to the petition. Failure to notify a creditor that its claim is listed as disputed, contingent, or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent, or unliquidated, as though a proof of claim had been filed by the creditor. The debtor shall file a certificate of service with the Court within three (3) days after service has been made.

Rule 3003.2

Time for Filing Claims in a Chapter 11 Case

In a chapter 11 case, a proof of claim shall be filed within ninety (90) days after the date first set for the meeting of creditors called pursuant to 11 U.S.C. § 341(a) of the Code, except as otherwise extended by order of the Court.

Rule 3010.1

Payments to Creditors in Chapter 13 Individual's Debt Adjustment Cases

Bankruptcy Rule 3010(b) is amended to the extent that standing chapter 13 trustees are authorized to make payments to creditors in amounts smaller than $15 without waiting until that creditor's dividends accumulate to $15. The decision as to whether to make smaller payments shall be solely in the discretion of the trustee as to what is in the best interest of the individual estate.

Rule 3012.1

Valuation of Security

After notice, a chapter 13 trustee may determine the value of a creditor's security at the 341 meeting and, unless an objection is filed within ten (10) days after notice of such valuation, the Court may accept the valuation for the purpose of distribution under the plan.

Rule 3017.1

Notices Required to Be Sent by Chapter 11 Debtors

The debtor in possession in chapter 11 cases shall be responsible for mailing the following notices and documents to creditors, after having their form and content approved by the clerk, and for filing a certificate of mailing with the clerk within three (3) days of the date of the mailing:

(1) notice of the meeting of creditors
(2) notice of the hearing on disclosure statement
(3) the plan, approved disclosure statement and notice regarding balloting and date for hearing on confirmation
(4) any other notices as the Court or clerk shall direct in a particular matter.

PART IV The Debtor: Duties and Benefits

Rule 4001.1

Relief From Automatic Stay; Use of Cash Collateral

The automatic stay as provided in 11 U.S.C. § 362(a) is modified in bankruptcy cases as follows:

(1) In chapters 7 and 13 cases, the Internal Revenue Service is authorized:
  (a) to make income tax refunds, in the ordinary course of business, directly to chapter 7 and 13 debtors unless otherwise ordered by the Court or otherwise instructed by the chapter 7 trustee or the standing chapter 13 trustee;
  (b) to offset against any refund due a debtor any taxes due the United States government;
  (c) to assess any tax liability satisfied by offsetting any refunds, when such liability has not been assessed previously;
  (d) to assess tax liabilities shown on voluntarily filed returns and other agreed-to liabilities.
(2) In chapter 13 cases, affected secured creditors may:
  (a) contact the debtor about the status of insurance coverage on property used as collateral;
  (b) if paid outside the plan, contact the debtor about any payment in default.
(3) In chapter 13 cases, if the collision insurance coverage on a vehicle less than seven (7) years old on which there is a lien lapses and the

debtor fails to obtain coverage and furnish evidence to the lienholder within ten (10) days thereafter, the automatic stay as to that lienholder shall be lifted.

(4) In chapter 7 cases, the abandonment of property pursuant to 11 U.S.C. § 554 shall have the effect of lifting the automatic stay with respect to the property abandoned as to the estate and as to the debtor.

Rule 4002.1

Duties of Chapter 13 Debtor

The debtor filing a petition requesting relief under chapter 13 of the Code shall comply with the following:

(1) The debtor shall begin making the payments called for in the proposed plan on the first day of the first month following the month in which the chapter 13 case is filed. Said payments shall be made directly to the standing chapter 13 trustee.

(2) If secured claims are to be paid outside of the plan, the debtor must continue to make the regular scheduled payments to the secured creditor prior to confirmation.

(3) The debtor shall maintain collision insurance on any vehicle less than seven (7) years old on which there is a lien. Failure to keep such insurance in force shall result in the lifting of the automatic stay as provided in Local Bankruptcy Rule No. 4001.1(3), EDNC.

(4) The debtor shall not dispose of any property by sale or otherwise without prior approval of the trustee and an order of the Court.

(5) The debtor shall not purchase additional property or incur additional indebtedness for an amount in excess of five hundred dollars ($500) without prior approval of the trustee and an order of the Court.

(6) When a case is dismissed prior to confirmation, the Court may require the debtor to provide adequate protection to one or more secured creditors by directing the chapter 13 trustee to make adequate protection payments from funds received under paragraph (1) of this rule.

Rule 4003.1

Exemptions

Except in unusual circumstances, each debtor, who is an individual, in a bankruptcy case shall file a claim for exempt property pursuant to Section 522(b)(1) of the Code, if at all, on Local Form No. 3, which form is available from the clerk; the debtor's filing of Local Form No. 3 must be referenced in Schedule B-4 of the debtor's schedules.

Rule 4003.2

Extension of Time for Objections to Exemptions

The Court may grant any party in interest an extension of time for objecting to the debtor's claim of exempt property. The request for extension shall be by motion which shall contain the reasons for requesting the extension. The motion must be filed before the time for objecting expires.

Rule 4004.1

Notice of Discharge

The attorney for the chapter 7 debtor shall promptly mail a copy of the final order of discharge to the persons specified in subdivision (a) of Bankruptcy Rule 4004, and shall file a certification that a copy of the order of discharge has been mailed and shown when and to whom the order was sent within three (3) days thereafter. Such certification shall conform substantially to Local Form No. 4 in these rules.

PART V Bankruptcy Courts and Clerks

Rule 5005.1

Filing of Papers

(1) In chapter 13 cases, proofs of claim shall be filed directly with the standing chapter 13 trustee to whom the case is assigned. The address of the proper standing trustee will be shown on the notice of the meeting of creditors. Claims will be dated and stamped as "received" as of the date they arrive in the office of the trustee, and the claim shall be deemed filed with the Court as of that date.

The staff of the standing chapter 13 trustee shall prepare a claims register for each case referred to that trustee and such claims register shall be transferred to the clerk and made a part of the permanent record at the closing of the case, together with the original claims.

(2) All pleadings (including but not limited to complaints, answers, motions and applications), and all proposed orders, shall be tendered by the party submitting such documents to the clerk, rather than directly to the judge unless otherwise specifically directed. The clerk shall first accomplish any necessary processing of such document before such document is forwarded to any judge of this Court for consideration.

PART VI Collection and Liquidation of the Estate

Reserved

PART VII Adversary Proceedings

Rule 7003.1

Commencement of an Adversary Proceeding

All complaints initiating adversary proceedings in bankruptcy cases shall be accompanied by a fully completed Bankruptcy Cover Sheet (Form BC-104) containing the complete information as listed therein.

Rule 7004.1

Service

Any and all filings (except claims) in all proceedings and cases under the Code must be served on the trustee (including the standing chapter 13 trustee) for the debtor whether or not such trustee is a party to the proceeding. In chapter 11 cases, the attorney for the debtor-in-possession is to be served in like manner.

Rule 7041.1

Dismissal of Actions for Lack of Prosecution

Except where a complaint objecting to a discharge has been filed, an adversary proceeding may be dismissed by the Court for lack of prosecution as follows:

(1) where no service of process has been made and certified to the Court within thirty (30) days after filing of the complaint; or

(2) where no responsive pleadings have been filed and plaintiff has not moved for entry of default within thirty (30) days after the time for filing responsive pleadings has expired.

Dismissal under this local rule shall be without prejudice unless the delay has resulted in prejudice to an opposing party.

Rule 7067.1

Deposit in Court

In the event that a depository intended by the Court to receive registry funds is not able, immediately upon the Court's receipt of the registry funds, to pledge sufficient collateral for receipt of those funds, such funds may be retained temporarily in non-interest bearing U.S. Treasury accounts as necessary to arrange for their deposit in interest-bearing accounts.

PART VIII Appeals to District Court or Bankruptcy Appellate Panel

Reserved

PART IX General Provisions

Rule 9004.1

General Requirements of Form; Number of Copies of Other Documents

The number of documents required other than those provided for in the Bankruptcy Rules or Local Bankruptcy Rules is as follows:

(1) Monthly operating report of debtor-in-possession and operating trustee . . . . original plus two

(2) Any person requesting filed copies of documents for his office records must submit copies in addition to those called for in the Bankruptcy Rules or Local Bankruptcy Rules, together with a stamped, self-addressed envelope

(3) Any order or judgment that is tendered to the Court for consideration shall have attached a sufficient number of copies for service on all parties required to receive notice of such order or judgment. Orders tendered without sufficient copies may not be considered until such time as the required number of copies has been tendered

(4) Applications for compensation
. . . . original plus two

(5) Motions, applications, answers, responses and other general pleadings
. . . . original plus two

Rule 9007.1

Designation of Parties to Provide Notice

The clerk is authorized to designate the parties who shall provide such notice to creditors and parties in interest as required under the Bankruptcy Rules and the Local Bankruptcy Rules.

Rule 9010.1

Representation and Appearances; Powers of Attorney

Local Rule No. 2.00, entitled "Attorneys", of the Local Rules for the United States District Court, Eastern District of North Carolina, is applicable in this Court, with the following exceptions:

(1) an individual may represent himself;
(2) an entity may be represented at a meeting of creditors by its officers and agents; however, all courtroom appearances, except as previously indicated, pleadings, motions, and objections must be by an attorney admitted to practice before this Court.

Rule 9010.2

Extent of an Attorney's Duty to Represent

Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the attorney of record for all purposes including the representation of the debtor in all matters that arise in conjunction with the proceeding until the case is closed or the attorney is relieved upon application and Court order. In the event additional fees are required, they must be applied for pursuant to Bankruptcy Rule 2016.

CASE NOTES

Attorneys who, after filing bankruptcy petition, are indifferent to the needs of their clients are not entitled to compensation. In re Wright, 48 Bankr. 172 (Bankr. E.D.N.C. 1985).

Rule 9014.1

Contested Matters

(1) *Requirements of Motion.* A motion shall be accompanied by all exhibits and attachments referred to in the motion, together with a notice of motion and certification of service. The notice of motion shall give notice of the filing of the motion, allow for a specific response time to the motion and shall conform substantially to Local Form No. 2 in these rules.

(2) *Time for Response.* A response and accompanying affidavits, if any, to any motion shall be filed within fifteen (15) days from the date of the notice of motion, unless otherwise ordered or provided in the Bankruptcy Rules or Local Bankruptcy Rules.

(3) *Service of Motion.* The moving party shall serve copies of the motion, together with all exhibits and attachments referred to therein, accompanied by a notice of motion in the manner prescribed in Bankruptcy Rule 7004, contemporaneously with the filing of the original motion and notice with the clerk, and shall attach a certificate of service to the original motion and notice to be filed with the clerk. Any motion received for filing with the clerk which is not accompanied by an appropriate notice and certificate of service shall not be accepted for filing by the clerk, but shall be returned to the moving party without action.

(4) *Response.* Any party against whom relief is sought may file a written response to the motion. The response may be accompanied by affidavits and other supporting documents and shall be served on all interested parties and service shall be certified to the Court.

(5) *Hearing on Motion.* Unless a hearing is requested in the motion or in the response thereto, motions may be determined without a hearing. A hearing on a motion may be ordered by the Court in its discretion.

(6) *Frivolous or Delaying Motions.* Where the Court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing such motion. Any party filing a request for a hearing shall appear at the hearing set by the Court in support of such request or costs may be assessed.

LOCAL FORMS

Local Form #1
Rev. 9/83

BANKRUPTCY CASE COVER SHEET

CAPTION OF PETITION: (See Bankruptcy Rule 1005)

LAST NAME   FIRST NAME   MIDDLE NAME   Social Security Number

SPOUSE IF JOINT PETITION:

LAST NAME   FIRST NAME   MIDDLE NAME   Social Security Number

IF THE DEBTOR IS A CORPORATION OR PARTNERSHIP OR OTHER ENTITY WHICH USES AN EMPLOYER'S IDENTIFICATION NUMBER, REFLECT NUMBER HERE ____________

ADDRESS OF DEBTOR:

Street Number, P. O. Box, City, State and ZIP CODE

County in Which Debtor Resides

County Code (See Reverse Side)

ATTORNEY FOR DEBTOR:

NAME: ____________
ADDRESS: ____________
CITY, STATE & ZIP: ____________
TELEPHONE NUMBER: (   ) ____________

CHECK ONE:
___ Joint Petition (husband & wife)
___ Individual Petition
___ Partnership
___ Corporation

CHECK ONE:
___ Voluntary
___ Involuntary

CHECK ONE:
___ Business
___ Non-Business

CASE COMMENCED UNDER: (check one)
___ CHAPTER 7
___ CHAPTER 7 - Stockbroker
___ CHAPTER 7 - Commodity Broker
___ CHAPTER 9
___ CHAPTER 11 Reorganization
___ CHAPTER 11 - Railroad
___ CHAPTER 13
___ SECTION 304

IF THE DEBTOR IS NOT REPRESENTED BY AN ATTORNEY, LIST HOME AND BUSINESS TELEPHONE NUMBERS:
HOME: ____________ WORK: ____________

COMPLETE THE FOLLOWING BLOCKS FROM INFORMATION CONTAINED IN THE SCHEDULES OF THE DEBTOR

(Round off to nearest dollar)
OBLIGATIONS OF DEBTOR AS SCHEDULED FOR ALL CHAPTERS (7, 11 and 13)

Priority Debts	$ .00
Secured Debts	$ .00
Unsecured Debts	$ .00
Total Assets of Debtor as Shown in Schedules B-1 thru B-3	$ .00
Total Number of Creditors Listed on Schedules A-1 thru A-3	
Total value of property claimed as exempt in Schedule B-4	$ .00

CHECK APPROPRIATE BOX:

☐ Filing Fees Paid in Full at Time of Filing

OR

☐ Filing Fees to be Paid in Installments (Application filed with petition)

NOTE: File original and one copy with the Clerk

NORTH CAROLINA

Number of counties, 100

Alamance	37001	Forsyth	37067	Onslow	37133
Alexander	37003	Franklin	37069	Orange	37135
Alleghany	37005	Gaston	37071	Pamlico	37137
Anson	37007	Gates	37073	Pasquotank	37139
Ashe	37009	Graham	37075	Pender	37141
Avery	37011	Granville	37077	Perquimans	37143
Beaufort	37013	Greene	37079	Person	37145
Bertie	37015	Guilford	37081	Pitt	37147
Bladen	37017	Halifax	37083	Polk	37149
Brunswick	37019	Harnett	37085	Randolph	37151
Buncombe	37021	Haywood	37087	Richmond	37153
Burke	37023	Henderson	37089	Robeson	37155
Cabarrus	37025	Hertford	37091	Rockingham	37157
Caldwell	37027	Hoke	37093	Rowan	37159
Camden	37029	Hyde	37095	Rutherford	37161
Carteret	37031	Iredell	37097	Sampson	37163
Caswell	37033	Jackson	37099	Scotland	37165
Catawba	37035	Johnston	37101	Stanly	37167
Chatham	37037	Jones	37103	Stokes	37169
Cherokee	37039	Lee	37105	Surry	37171
Chowan	37041	Lenoir	37107	Swain	37173
Clay	37043	Lincoln	37109	Transylvania	37175
Cleveland	37045	McDowell	37111	Tyrrell	37177
Columbus	37047	Macon	37113	Union	37179
Craven	37049	Madison	37115	Vance	37181
Cumberland	37051	Martin	37117	Wake	37183
Currituck	37053	Mecklenburg	37119	Warren	37185
Dare	37055	Mitchell	37121	Washington	37187
Davidson	37057	Montgomery	37123	Watauga	37189
Davie	37059	Moore	37125	Wayne	37191
Duplin	37061	Nash	37127	Wilkes	37193
Durham	37063	New Hanover	37129	Wilson	37195
Edgecombe	37065	Northampton	37131	Yadkin	37197
				Yancey	37199

Local Form #2
Rev. 11/83

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF NORTH CAROLINA

IN THE MATTER OF:

CASE NO.:
SS#
ID#
CHAPTER:

DEBTOR(S)

NOTICE OF MOTION
AND
CERTIFICATE OF SERVICE

TO: THE DEBTOR(S), ATTORNEY FOR THE DEBTOR(S), TRUSTEE AND OTHER PARTIES IN INTEREST

NOTICE IS HEREBY GIVEN of the Motion to (nature of motion) filed simultaneously herewith by (moving party) in the above captioned case; and

FURTHER NOTICE IS HEREBY GIVEN that if you fail to respond or otherwise plead or request a hearing in writing within ______ days from the date of this notice, the relief requested in the motion may be granted without further hearing or notice; and

FURTHER NOTICE IS HEREBY GIVEN that if a response and a request for a hearing is filed by the debtor(s), trustee, or other parties in interest named herein in writing within the time indicated, a hearing will be conducted on the motion and response thereto at a date, time and place to be later set by this Court and all interested parties will be notified accordingly.

DATE OF NOTICE: (must be same date of service)

____
(Movant's Name and Address)

CERTIFICATION OF SERVICE

I, ______________________________, of ______________________________ certify:

That I am, and at all times hereinafter mentioned was, more than eighteen (18) years of age;

That on the _____day of_________________, 19___, I served copies of the foregoing motion and notice of motion on [include address(es)]

by (describe here the mode of service)

I certify under penalty of perjury that the foregoing is true and correct.

Executed on ___________________________ ___________________________
Date Signature

Local Form #3

Page 1 of 4

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF NORTH CAROLINA

IN THE MATTER OF: CASE NUMBER:

SCHEDULE B-4 CLAIM OF EXEMPTIONS

I, ____________________________________, claim the following property as exempt pursuant to 11 USC 522(b)(2)(A) and (B) and the laws of the State of North Carolina, and non-bankruptcy Federal Law:

1. NCGS 1C-1601(a)(1) (NC Const., Article X, Section 2) REAL OR PERSONAL PROPERTY USED AS A RESIDENCE OR BURIAL PLOT (exemption not to exceed $7,500.00)

Description of Property & Address	Market Value	Mtg. Holder or Lien Holder	Amt. Mtg. or Lien	Net Value

VALUE OF REAL ESTATE CLAIMED AS EXEMPT: $ .00

2. NCGS 1C-1601(a)(3) MOTOR VEHICLE (exemption in one vehicle not to exceed $1,000.00)

Model, Year Style of Auto	Market Value	Lien Holder	Amt. Lien	Net Value

VALUE OF MOTOR VEHICLE CLAIMED AS EXEMPT: $ .00

3. NCGS 1C-1601(a)(4) (NC Const., Article X, Section 1) PERSONAL OR HOUSEHOLD GOODS (net value not to exceed $2,500.00 plus $500.00 for first four dependents.)

The number of dependents for exemption purposes is: _____

Description of Property	Market Value	Lien Holder	Amt. Lien	Net Value
Clothing & Personal				
Kitchen Appliances				
Stove				
Refrigerator				
Freezer				
Washing Machine				
Dryer				
China				

Page 2 of 4

Silver				
Jewelry				
Living Rm. Furn.				
Den Furn.				
Bedroom Furn				
Dining Rm. Furn.				
Lawn Furn.				
Television				
( )Stereo ( )Radio				
Musical Instruments				
( )Piano ( )Organ				
Air Conditioner				
Paintings/Art				
Lawn Mower				
Yard Tools				
Crops				
Recreational Equip.				

VALUE CLAIMED AS EXEMPT: $ .00

4. NCGS 1C-1601(a)(5) TOOLS OF TRADE (total net value not to exceed $500.00 in value)

Description	Market Value	Lien Holder	Amt. Lien	Net Value

VALUE CLAIMED AS EXEMPT: $ .00

5. NCGS 1C-1601(a)(6) LIFE INSURANCE (NC Const., Article X, Section 5)

Company	Insured	Policy Number	Beneficiary	Cash Value

6. NCGS 1C-1601(a)(7) PROFESSIONALLY PRESCRIBED HEALTH AIDS (Debtor or Debtor's Dependents, no limit on value)

Description

7. NCGS 1C-1601(a)(8) COMPENSATION FOR PERSONAL INJURY OR DEATH OF A PERSON UPON WHOM THE DEBTOR WAS DEPENDENT FOR SUPPORT. COMPENSATION NOT EXEMPT FROM RELATED LEGAL, HEALTH OR FUNERAL EXPENSE.

Page 3 of 4

8. NCGS 1C-1601(a)(2) ANY PROPERTY (total net value not to exceed $2,500.00 less any amount used under NCGS 1C-1601(1) and after reduction for overages in categories 2, 3, and 4.)

Description	Market Value	Lien Holder	Amt. Lien	Net Value

9. TENANCY BY THE ENTIRETY. The following property is claimed as exempt pursuant to 11 USC 522(b)(2)(B) and the law of the State of North Carolin pertaining to property held as tenants by the entirety.

Description of Property & Address	Market Value	Lien Holder	Amt. Lien	Net Value

VALUE OF ENTIRETIES PROPERTY CLAIMED AS EXEMPT: $ .00

10. OTHER EXEMPTIONS CLAIMED UNDER LAWS OF THE STATE OF NORTH CAROLINA

		Amount
a.	Aid to the Aged, Disabled and Families with Dependent Children NCGS 108A-36	
b.	Aid to the Blind NCGS 111-18	
c.	Yearly Allowance for Surviving Spouse NCGS 30-15, NCGS 30-33	
d.	North Carolina Local Government Employees Retirement benefits NCGS 128-31	
e.	North Carolina Teachers and State Employees Retirement benefits NCGS 135-9	
f.	Firemen's Relief Fund pensions NCGS 118-49	
g.	Fraternal Benefit Society benefits NCGS 58-283	
h.	Workers Compensation benefits NCGS 97-21	
i.	Unemployment benefits, so long as not comingled and except for debts for necessities purchased while unemployed NCGS 96-17	
j.	Group insurance proceeds NCGS 58-213	
k.	Partnership property, except on a claim against the partnership NCGS 59-55	
l.	Wages of debtor necessary for support of family NCGS 1-362	

TOTAL PROPERTY CLAIMED AS EXEMPT: $ .00

11. EXEMPTIONS CLAIMED UNDER NON-BANKRUPTCY FEDERAL LAW

		Amount
a.	Foreign Service Retirement and Disability Payments 22 USC 1104	
b.	Social Security benefits 42 USC 407	
c.	Injury or death compensation payments from war risk hazards 42 USC 1717	
d.	Wages of fishermen, seamen, and apprentices 46 USC 601	
e.	Civil Service Retirement benefits 5 USC 729, 2265	

Page 4 of 4

f. Longshoremen and Harbor Workers Compensation Act death and disability benefits 33 USC 916 ________
g. Railroad Retirement Act annuities and pensions 45 USC 228(L) ________
h. Veterans benefits 45 USC 352(E) ________
i. Special pension paid to winners of Congressional Medal of Honor 38 USC 3101 ________
j. Federal homestead lands, on debts contracted before the issuance of the patent 43 USC 175 ________

VALUE OF PROPERTY CLAIMED AS EXEMPT: $ .00

12. The following tangible personal property was purchased by the debtor within 90 days of the filing of the bankruptcy petition:

Description	Market Value	Lien Holder	Amt. Lien	Net Value

13. The debtor's property is subject to the following claims:

a. Of the United States or its agencies as provided by federal law
b. Of the State of North Carolina or its subdivisions for taxes or appearance bonds
c. Of a lien by a laborer
d. Of a lien by a mechanic
e. For payment of obligations contracted for the purchase of specific property
f. For repair or improvement of specific property
g. For contractual security interests in specific property, except debtor's household goods on which there exists a nonpossessory, nonpurchase money security interest
h. For statutory liens, other than judicial liens
i. For child support or alimony, ordered pursuant to Chapter 50 of the General Statutes of North Carolina

Claimant	Nature of Claim	Amt. of Claim	Description of Property	Value of Property	Net Value

None of the property listed in paragraph 12 has been included in this claim of exemptions.

None of the claims listed in paragraph 13 is subject to this claim of exemptions.

DATE:

____
DEBTOR

LOCAL FORM #4

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF NORTH CAROLINA

IN RE: CASE NUMBER:

DEBTOR

CERTIFICATE OF MAILING
OF
ORDER OF DISCHARGE

I,

of**

certify:

That I am, and at all times hereinafter mentioned was, more than 18 years of age;

That on ___________________________, 19__, I served a copy of the order of discharge of debtor on each of the debtor's creditors named in the schedules or list of creditors filed herein or as otherwise appearing in the files in this case, except where the address is unknown, by enclosing the copy of the order in a sealed, postage pre-paid envelope bearing the name and address of each creditor as shown in the record in this case.

That the envelope containing such copy of the order was deposited by me in a regular United States Mail Box in the City of _______________ _________________, in said District on the _____ day of _______________, 19__.

DATED:

____
Attorney for the Debtor

**Include Post Office Address

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Adopted effective January 1, 1985.

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I. General Rules

Rule 101

Philosophy of Rules

These rules shall be construed and enforced in such manner as to avoid technical delay, permit just and prompt determination of all proceedings, and promote the efficient administration of justice.

Rule 102

Scope of Rules

These rules shall govern the procedure in all proceedings before this court, except for proceedings before the bankruptcy court. As used in these rules, the term “judge” refers to a United States District Court Judge, and the term “magistrate” refers to a full-time United States Magistrate.

Rule 103

Attorneys

(a) **Roll of Attorneys.** The bar of this court shall consist of those attorneys admitted to practice before this court.

(b) **Eligibility and Admission.** To be eligible for admission to the bar of the court, a person must be admitted to the practice of law in this state and in good standing with the Supreme Court of North Carolina. A judge or magistrate will consider a request for admission only upon motion made in open court by a member of the bar of this court. Prior to being admitted to practice, an attorney must certify that he has read and is familiar with the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Local Rules of this court, and the North Carolina Code of Professional Responsibility. Attorneys seeking admission to practice in this court must take an oath or make an affirmation in a form approved by the court and pay the filing fee.

(c) **Litigants Must Be Represented by Member of the Bar of This Court.**

(1) Litigants in civil and criminal actions and parties in bankruptcy proceedings before this court, except governmental agencies and parties

appearing *pro se*, must be represented by at least one attorney who is a member of the bar of this court. The service of all pleadings and papers permitted by the Federal Rules of Civil and Criminal Procedures shall be sufficient if made upon such attorney.

(2) All pleadings and papers presented to the clerk for filing, except by attorneys representing governmental agencies or parties appearing *pro se*, shall be rejected by the clerk unless signed by a member of the bar of this court.

(d) **Special Appearance.**

(1) Attorneys who are members in good standing of the bar of the highest court of any state or the District of Columbia may practice in this court for a particular case in association with a member of the bar of this court. By entering an appearance, an attorney agrees that:

(i) he will be responsible for ensuring the presence of an attorney who is familiar with the case and has authority to control the litigation at all conferences, hearings, trials and other proceedings; and that

(ii) he submits himself to the disciplinary jurisdiction of the court for any misconduct in connection with the litigation for which he is specially appearing.

(2) A member of the bar of this court who accepts employment in association with a specially appearing attorney is responsible to this court for the conduct of the litigation or proceeding and must sign all pleadings and papers, except for certificates of service. Such member must be present during pretrial conferences, potentially dispositive proceedings, and trial.

(e) **Withdrawal of Appearance.** No attorney who has entered an appearance in any civil or criminal action shall be permitted to withdraw his appearance, or have it stricken from the record, except on order of the court. (Amended June 7, 1985.)

Rule 104

Court Schedule and Conduct of Business

(a) **Headquarters.** The headquarters of the court shall be located in Greensboro. All pleadings and papers submitted for filing shall be presented to the clerk in Greensboro, except that papers may be filed in open court in any court location when permitted by a judge or magistrate.

(b) **Scheduling.** Conferences, hearings, and trials will be scheduled by the court or by the clerk at the court's direction. All sessions of court will commence at 9:30 a.m. unless otherwise announced.

(c) **Naturalization.** Petitions for naturalization will be considered by the court at Greensboro, North Carolina, on Fridays after the third Mondays in March, July, and October, unless otherwise ordered. In its discretion, the court may at other times consider petitions for naturalization when made by members of the armed services, seamen on merchant vessels registered under the laws of the United States, members of the immediate families and dependents of such personnel, or other persons in exceptional circumstances.

(d) **Divisions of the Court.** There are five divisions of the court, as follows:

Division	Counties Comprising Division
Durham	Person
	Lee
	Orange
	Chatham
	Durham
Greensboro	Alamance
	Caswell
	Guilford
	Randolph
	Rockingham
Rockingham	Hoke
	Montgomery
	Moore
	Richmond
	Scotland
Salisbury	Cabarrus
	Davidson
	Davie
	Rowan
	Stanly
Winston-Salem	Forsyth
	Stokes
	Surry
	Yadkin

Rule 105

Extensions of Time and Continuances of Hearings

(a) **Motions for an Extension of Time to Perform an Act.** All motions for an extension of time to perform an act required or allowed to be done within a specified time must show prior consultation with opposing counsel and the views of opposing counsel. Extensions will not be allowed unless the motion is made before the expiration of the specified time, except upon a showing of excusable neglect. Stipulations with respect to extensions of time are subject to the approval of the court. Consent orders extending time may be signed by the clerk to the extent provided by local Rule 108. Extensions to file an answer or other responsive pleading will not be granted beyond a total of 30 days from the date the answer was originally due, except upon a showing of good cause.

(b) **Motions for Continuance.** All motions to continue a pretrial conference, hearing on a motion, or the trial of an action must be presented through the clerk's office for the court's consideration reasonably in advance of the hearing date and must reflect the views of opposing counsel.

Rule 106

Form of Pleadings and Papers

(a) **Form.** Pleadings, motions, briefs, and other papers submitted for filing must be typewritten, printed, or legibly handwritten on letter size paper. The pages shall be unfolded and shall be bound at the top and numbered at the bottom, without manuscript cover. Typewritten documents should be double spaced or one and one-half spaced. Mechanically reproduced copies which bear an original signature will be accepted by the court as originals.

(b) **Identification of Documents.** All papers submitted for filing shall follow the heading format set out in the Appendix of Forms, Fed. R. Civ. P., and papers submitted subsequent to the original complaint shall bear the case number.

(c) **Telephone Numbers and Addresses.** Parties or attorneys signing papers submitted for filing must state their telephone numbers as well as their addresses.

(d) **Exhibits to Pleadings or Papers.** Bulky or voluminous materials should not be submitted for filing with a pleading or paper, or incorporated by reference therein, unless such materials are essential. The court may order any pleading or paper stricken if filed in violation of this rule.

(e) **Civil Rights Actions by Prisoners, 42 U.S.C. § 1983.** All pro se complaints filed by state prisoners seeking relief under 42 U.S.C. § 1983 shall be filed with the clerk in compliance with the instructions of the clerk and on appropriate forms which are available without charge in the clerk's office. In each action, an original and one copy of the complaint for the court and one copy of the complaint for each defendant must be provided by the plaintiff.

Rule 107

Briefs and Memoranda of Law

(a) **Contents.** All briefs filed with the court shall contain:

(1) A statement of the nature of the matter before the court.
(2) A concise statement of the facts. Each statement of fact should be supported by reference to a part of the official record in the case.
(3) A statement of the question or questions presented.
(4) The argument, which shall refer to all statutes, rules and authorities relied upon.

(b) **Citation of Cases.** Cases cited should include parallel citations, the year of the decision, and the court deciding the case. If a petition for certiorari was filed in the United States Supreme Court, disposition of the case should be shown with three parallel citations (e.g., Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), cert. denied, 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664 (1957).

(c) **Citation of Unpublished Decisions.** Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed. Unpublished decisions should be cited as follows: Wise v. Richardson, No. C-70-191-S (M.D.N.C., August 11, 1971).

(d) **Citation of Decisions Not Appearing in Certain Published Reports.** Decisions published in reports other than the West Federal Reporter System, the official North Carolina reports and the official United States Supreme Court reports (e.g., C.C.H. Reports, Labor Reports, U.S.P.Q., reported decisions of other states or other specialized reporting services) may be cited only if the decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed.

(e) **Additional Copies of Briefs for Court Use.** At the time the original of a brief is filed, a working copy of the brief for use by the judge or magistrate shall be delivered to the clerk.

Rule 108

Orders and Judgments Grantable by Clerk

(a) **Orders and Judgments.** The clerk is authorized to grant the following orders and judgments without direction by the court:

(1) Consent orders for the substitution of attorneys.

(2) Consent orders in civil actions for extending for not more than 30 days (plus an additional 30 days upon a showing of good cause) the time within which to answer or otherwise plead, to answer interrogatories, to respond to requests for production of documents, to respond to requests for admission, or to respond to motions.

(3) Consent orders dismissing an action, except in cases governed by Rules 23 or 66, Fed. R. Civ. P.

(4) Entry of default and judgment by default as provided for in Rules 55(a) and 55(b)(1), Fed. R. Civ. P.

(5) Orders canceling liability on bonds other than orders disbursing funds from the court's registry account.

(6) Orders appointing persons to serve process pursuant to Rule 4(c), Fed. R. Civ. P.

(7) Ex parte orders as authorized in local Rule 203(f).

(b) **Clerk's Action Reviewable.** The actions of the clerk may be suspended, altered or rescinded by the court upon cause shown.

Rule 109

Access to Court Records

(a) **Access.** The public records of the court are available for examination in the clerk's office during normal business hours.

(1) No file, pleading or paper, or index card may be removed from the clerk's office without the approval of a judge or magistrate.

(2) When removal of a file or document is authorized, the clerk will set a date for its return and will require a written receipt for its release.

(b) **Copies.** The clerk will make and furnish copies of official court records upon request and upon payment of prescribed fees.

Rule 110

Sureties

(a) **Security.** Except as otherwise provided by law or by order of the court, all bonds, guaranties, and undertakings must be secured by:

(1) Deposit of cash, certified check, certificate of deposit, bank draft, Post Office money order, negotiable bond, note of the United States as defined in Title 6, U.S.C. § 15, or other bond or note of the United States with the agreement provided for in 6 U.S.C. § 15;

(2) Undertaking of guaranty of a company holding a certificate of authority from the U.S. Department of Treasury as an acceptable surety on federal bonds; which company has filed with the clerk the designation of a resident of this district as agent, dated not more than three years earlier than the date of the undertaking, upon whom process may be served; and which company is otherwise qualified by having met all requirements of the law of North Carolina and of Title 6, U.S.C. §§ 6-13; or

(3) Undertaking of individual surety or sureties who are residents of North Carolina and own property within the state worth double the amount of the bond or undertaking over all exemptions, debts, liabilities and other obligations.

(b) **Individual Sureties.**

(1) An individual surety must execute an affidavit of justification giving full name, occupation, residence address, business address, and facts showing his financial qualification to act as surety.

(2) A husband and wife are considered as one surety.

(3) Members of the bar, officers and employees of this court, and employees of the Department of Justice serving in this district may not serve as sureties in any suit, action, or proceeding in this court.

(c) **Approval.** All bonds, guaranties, undertakings, and individual sureties must be approved by a judge, magistrate, or the clerk. Individual sureties who justify on the basis of ownership of real or personal property may be required to provide proof of ownership such as a title search and certificate of title, and give security in the form of a proper security instrument or deed of trust.

Rule 111

Registry Funds

(a) **Deposit with the Treasury.** Unless otherwise ordered by the court, the clerk shall deposit registry funds in the Treasury of the United States.

(b) **Investment in Income-Earning Account.** Upon motion or upon consent of the parties, the court may order the clerk to invest certain registry funds in an income-earning account. The order may issue upon a consent request of the parties or upon motion by an interested party, in accordance with the following procedures:

(1) A consent request must demonstrate the assent of all interested and potentially interested parties. The agreement must demonstrate that the investment will be in compliance with applicable provisions of the law regulating the investment of public monies, provide for proper disposition of future earnings, and set out with particularity the following information:

(i) The form of deposit;
(ii) The amount to be invested;
(iii) The type of investment to be made by the clerk of court; i.e., passbook savings, insured money fund, CD, etc.
(iv) The name and address of the private institution where the deposit is to be made;
(v) The rate of interest at which the deposit is to be made, if possible;
(vi) The length of time the money should be invested, whether it should automatically be reinvested, etc., keeping in mind that some investments include a penalty for early withdrawal;
(vii) The name and address of the designated beneficiary or beneficiaries;
(viii) The form of additional collateral to be posted by the private institution in the event that the standard F.D.I.C. coverage is insufficient to insure the total amount of deposit; and
(ix) Such other information that may be deemed appropriate under the facts and circumstances of the particular case.

The consent request shall be accompanied by a proposed order directing the clerk to proceed with the investment.

(2) A motion may be filed ex parte by an interested party, and the court may enter an order in advance of the filing of any response thereto. The motion must set forth the showings required in subsection (b)(1) concerning the investment and must include a proposed order. The motion must be served on all known interested parties who do not join therein. If an order is entered prior to the filing of a response in opposition, the motion will be reconsidered by the court. The court may determine the motion upon the record or may, in its discretion, call for a hearing on the matter.

Rule 112

Juries in Civil and Criminal Cases

(a) **Examination of Jurors.**

(1) The court will conduct the examination of prospective jurors.

(2) When the court's examination is completed, attorneys and parties appearing pro se may request that the court ask additional questions to the prospective jurors.

(b) **Contacts Prohibited.**

(1) All parties, witnesses, and attorneys shall avoid any extrajudicial contact or communication with a grand juror or member of a petit jury venire or panel who has been or may be selected in a case in which that person is involved. No person may have any extrajudicial contact or communication, either directly or indirectly, with a grand juror, member of a petit jury venire or panel which may reasonably have the effect of influencing, or which is intended to influence, the grand juror, potential petit juror, or sitting petit juror.

(2) Attorneys for parties shall inform their clients and witnesses of this rule.

(3) No person shall approach a juror, either directly or through any member of his immediate family, in an effort to secure information concerning the juror's background.

(4) No provision of this rule is intended to prohibit communication with a petit juror after the juror has been dismissed from further service, so

long as the communication does not tend to harass, humiliate, or intimidate the juror in any fashion.

(c) **Disclosure of Names and Addresses of Prospective Jurors.**

(1) The names of prospective jurors for any session of court or for a specific case may not be disclosed prior to their reporting for duty except in compliance with instructions of the court. The clerk will make available to counsel for the parties, and to any parties appearing pro se, a list which sets forth the name, general address, and occupation of each potential juror when court is opened for the session for which the jurors have been summoned.

(2) The names, addresses, and telephone numbers of persons who have served as jurors may not be disclosed by the clerk's office without court permission.

(d) **Number of Jurors in Civil Jury Cases.** In civil jury cases the jury shall consist of six (6) members.

Rule 113

Jury Arguments and Instructions

(a) **Jury Arguments.** In the trial of civil actions the party having the burden of proof shall have the right to open and close the jury argument, without regard to whether the defendant has offered evidence. If each of the parties has the burden of proof on one or more issues, the court, in its discretion, shall determine the order of arguments. All arguments shall be subject to such time limitations as may be imposed by the court.

(b) **Instructions to Jury.** In all cases tried to a jury, a party who desires the jury to be instructed on a particular point must set it out in writing and furnish it to the court before jury arguments commence.

Rule 114

Courtroom Practices

(a) **Addressing the Court.** Attorneys or pro se litigants shall rise when addressing the court, and shall make all statements to the court from behind the counsel table or the lectern facing the court. They shall not approach the bench, except upon the permission of the court.

(b) **Questioning Witnesses.** While questioning witnesses, attorneys or pro se litigants shall remain seated or standing behind the counsel table or standing at the lectern. They shall not approach the witness except for the purpose of examining the witness with respect to an exhibit. Only one attorney for each party may participate in the examination or cross-examination of a witness.

Rule 115

Custody and Disposition of Trial Exhibits, Sealed Documents, and Filed Depositions

(a) **Custody with the Clerk.** Unless otherwise directed by the court, all trial exhibits admitted into evidence in criminal and civil actions shall be placed in the custody of the clerk, except as provided in section (b) below.

(b) **Custody with the Offering Party.** All exhibits not suitable for filing and transmission to the court of appeals as a part of a record on appeal shall be retained in the custody of the party offering them, subject to the orders of the court. Such exhibits shall include, but not be limited to, the following types of bulky or sensitive exhibits: narcotics and other controlled substances, firearms, ammunition, explosive devices, jewelry, liquor, poisonous or dangerous chemicals, money or articles of high monetary value, counterfeit money, and documents or physical exhibits of unusual bulk or weight.

At the conclusion of a trial or proceeding, the party offering such exhibits shall retain custody of them and be responsible to the court for preserving them in their condition as of the time admitted until any appeal is resolved or the time for appeal has expired. The party retaining custody shall make such exhibits available to opposing counsel for use in preparation of an appeal and be responsible for their safe transmission to the appellate court, if required.

(c) **Disposition of Exhibits, Sealed Documents, and Filed Depositions by Clerk.** Any exhibit, sealed document, or filed deposition in the clerk's custody more than 30 days after the time for appeal, if any, has expired or an appeal has been decided and mandate received, may be returned to the parties or destroyed by the clerk.

(d) **Depositions.** Depositions read into the court record are considered exhibits for which the parties shall be responsible as provided in section (b) above. Depositions on file admitted into evidence but not read into the record shall be retained in the clerk's custody and disposed of as authorized in section (c) of this rule.

Rule 116

Designation of Contents of Record on Interlocutory Appeal

Unless the parties file a written stipulation with the clerk, within 20 days after notice of interlocutory appeal is filed, designating the papers which shall constitute the record on appeal, the clerk shall certify and forward to the court of appeals all the original papers in the file jacket dealing with the action or proceeding in which the appeal is taken.

Rule 117

Disposition of Private Property

(a) **Disposition.** Whenever, during the course of an investigation, a trial of any action, or any other proceeding in this court, money, contraband, or other private property comes into the possession or custody of a law enforcement officer or an officer of the court, which will require an order of this court to determine its ownership or proper disposition, it is the responsibility of the attorney representing the party having original custody or control of such property to apply to the court for an order determining its ownership and directing its disposition.

(1) This application must be made before the conclusion of the litigation while all parties are before the court in person or through their attorneys.

(2) If the court cannot determine ownership or the proper disposition on the basis of the record or information from the parties before it, application must be made for an order providing for temporary custody pending institution of appropriate civil proceedings to determine final ownership or disposition.

(b) **Sanctions.** The court may impose sanctions as provided in local Rule 122 against any party or attorney whose failure to comply with this rule necessitates a subsequent hearing or court proceeding which would otherwise not have been necessary.

Rule 118

Official Court Reporters

The duties and responsibilities of official court reporters of this court are set forth in the Court Reporters Management Plan which is a public document on file with the office of the clerk.

Rule 119

Photographs, Recordings, and Broadcasts

Radio or television broadcasting and the use of photographic, electronic, or mechanical reproduction or recording equipment without court permission is prohibited in courtrooms or their environs. "Environs" is defined to mean the courtrooms, the offices of the judges, magistrates, clerk, probation officers, or any corridor connecting or adjacent thereto. Ceremonial proceedings such as the administration of oaths of office to appointed officials of the court, naturalization, and presentation of portraits, may be photographed in or broadcast from the courtroom, under the supervision of the court. This rule does not apply to courtroom proceedings by other government agencies.

Rule 120

Court Libraries

The court's libraries are maintained for the exclusive use of the judges and magistrates.

Rule 121

Release of Information by Court Personnel

All court personnel, including, among others, the United States Marshal and his deputies, the clerk of court and his deputies, the chief probation officer and his officers, bailiffs, and court reporters, are prohibited from disclosing to any person, without authorization by the court, information relating to a case that is not part of the public records of the court. This proscription applies to the divulgence of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

Rule 122

Sanctions

(a) **Imposition of Sanctions.** If an attorney or a party fails to comply with a local rule of this court, the court may impose sanctions against the attorney or party, or both. The court may make such orders as are just under the circumstances of the case, including the following:

(1) An order that designated matters or facts shall be taken as established for purposes of the action;

(2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(3) An order striking out pleadings or parts thereof, or staying proceedings until the rule is complied with, or dismissing the action or any part thereof, or rendering a judgment by default against the failing party;

(4) An order imposing costs, including attorney's fees, against the party, or his attorney, who has failed to comply with a local rule.

(b) **Sanctions Within the Discretion of the Court.** The imposition of sanctions for violation of a local rule is discretionary with the court. In considering the imposition of sanctions, the court may consider whether a party's failure was substantially justified or whether other circumstances make the imposition of sanctions inappropriate.

Rule 123

Marshal Security

The United States Marshal or a deputy shall be present at all proceedings held in open court, unless otherwise ordered by the court.

Rules 124-199

[Reserved for future purposes]

II. Civil Rules

Rule 201

Commencement of Actions

(a) **Civil Docket Cover Sheet.** A civil docket cover sheet, in a form supplied by the clerk, must be completed and submitted in duplicate with any complaint commencing an action or any petition for removal from state court.

(b) **Removal Petitions.** The penal sum of a bond required by 28 U.S.C. § 1446(d) upon removal of an action is $500.00, unless otherwise ordered.

Rule 202

Filing of Papers and Proof of Service

(a) **Additional Copies for Court Use.** A copy of the following documents should be delivered to the clerk for use by the court when the original is filed:

(1) A brief.
(2) Proposed findings of facts and conclusions of law.
(3) Requests for jury instructions.
(4) Final pretrial order.

(b) **Proof of Service.** Proof of service of papers other than the original complaint may be made by written acknowledgment of service by the party served, or by a certificate of counsel for the party filing the pleading or paper, or by affidavit of the person making service, but these methods of proof shall not be exclusive. The original of all papers filed shall indicate the date and method of service.

(c) **Ex Parte Orders.** Whenever the court has made an ex parte order, the party obtaining it shall serve, within two days thereafter, a copy thereof upon each adverse party who is affected thereby, together with a copy of the papers on which the order was based.

(d) **Files in Condemnation Actions Commenced by the United States.** When the United States files separate condemnation actions and a single declaration of taking relating to those separate actions, the clerk is authorized to establish a master file in which the declaration of taking may be filed, and the filing of the declaration of taking therein shall constitute a filing of the same in each of the actions to which it relates.

Rule 203

Motion Practice

(a) **Form.** All motions, unless made during a hearing or at trial, shall be in writing and shall be accompanied by a brief except as provided in section (h) of this rule.

(b) **Content.** All motions shall state with particularity the grounds therefor, shall cite any statute or rule of procedure relied upon, and shall set forth the relief or order sought.

(c) **Decided on Motion Papers and Briefs.**

(1) Motions shall be considered and decided by the court on the pleadings, admissible evidence in the official court file, and motion papers and briefs, without hearing or oral argument, unless otherwise ordered by the court. Special considerations thought by counsel sufficient to warrant a hearing or oral argument may be brought to the court's attention in the motion or response.

(2) The clerk shall give at least five days' notice of the date and place of oral argument. The court, however, for good cause shown may shorten the five-day notice period.

(d) **Movant's Supporting Documents and Brief.** When allegations of facts not appearing of record are relied upon in support of a motion, all affidavits, all parts of depositions, and other pertinent documents then available shall accompany the motion. If supporting documents are not then available, the party may move for an extension of time in accordance with section (f) of this rule.

(e) **Response to Motion and Brief.** If the respondent opposes a motion, he shall file his response including brief, within twenty days after service of the motion. If supporting documents are not then available, he may move for an extension of time in accordance with section (f) of this rule. For good cause appearing therefor, a respondent may be required to file his response and supporting documents, including brief, within such shorter period of time as the court may specify.

(f) **Extension of Time For Filing Supporting Documents and Briefs.** The clerk may enter an ex parte order, or approve a stipulation by the parties, specifying the time within which supporting documents and briefs may be filed pursuant to sections (d) and (e), upon a showing in writing that such documents are not available or cannot be filed contemporaneously with the motion or response. Application for an extension of time shall be filed with the motion or response and shall be accompanied by a proposed order. The time allowed to an opposing party for filing a response shall not run during any such extension.

(g) **Reply Brief.** A reply brief of no more than ten pages may be filed within ten days after service of the response. A reply brief is limited to discussion of matters newly raised in the response. A suggestion of subsequently decided controlling authority, without argument, may be filed at any time prior to the court's ruling and shall contain only the citation to the case relied upon if published or a copy of the opinion if the case is unpublished.

(h) **Motions Not Requiring Briefs.** No brief is required by either movant or respondent, unless otherwise directed by the court, with respect to the following motions: (1) for extension of time for the performance of an act required or allowed to be done, provided request therefor is made before the expiration of the period originally prescribed or as extended by previous orders; (2) to continue a pretrial conference, hearing, or the trial of an action; (3) to add parties; (4) to amend the pleadings; (5) to file supplemental pleadings; (6) to appoint a next friend or guardian ad litem; (7) for substitution of parties;

and (8) to stay proceedings to enforce judgment. The above motions, while not required to be accompanied by a brief, must state the grounds therefor and cite any applicable rule, statute, or other authority justifying the relief sought.

(i) **Failure to File and Serve Motion Papers.** The failure to file a brief or response within the time specified in this rule shall constitute a waiver of the right thereafter to file such brief of response, except upon a showing of excusable neglect. A motion unaccompanied by a required brief may, in the discretion of the court, be summarily denied. A response unaccompanied by a required brief may, in the discretion of the court, be disregarded and the pending motion may be considered and decided as an uncontested motion. If a respondent fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice.

CASE NOTES

Applied in Guthrie v. Heckler, 587 F. Supp. 1471 (M.D.N.C. 1984).

Rule 204

Initial Pretrial Order

(a) **Requirement for Initial Pretrial Order.** There shall be an initial pretrial order entered in every civil case, except in

(1) Social Security cases and other actions for review of administrative decisions;
(2) Prisoner petitions;
(3) Internal Revenue summons proceedings.

(b) **Initial Pretrial Order by Conference.** After the issue is joined, the clerk shall schedule an initial pretrial conference and give at least twenty (20) days notice thereof. At the initial pretrial conference, the court and the parties may discuss any matter suggested in Rule 16, Fed. R. Civ. P., and all matters identified in section (c) of this rule. At the conclusion of the conference, the court will enter a written initial pretrial order which will control the conduct of the litigation.

(c) **Initial Pretrial Order by Stipulation.** The initial pretrial order may be entered upon the stipulations of the parties, without a conference, if the parties submit to the court satisfactory stipulations at least ten (10) days before the scheduled initial pretrial conference. See, suggested Form 1, Appendix of Forms. Stipulations not received by the clerk at least ten (10) days prior to the initial pretrial conference will not be considered by the court and the conference will be convened as scheduled. The court may also direct that the initial pretrial conference be convened in any case in which it determines that the stipulations prepared by the parties are inadequate to control the litigation or that a conference will materially assist in managing the orderly and efficient conduct of the litigation.

The Initial Pretrial Stipulations and Order (Form 1) must set forth the stipulations, or respective positions of the parties, with respect to:

(1) Whether all parties defendant have been properly served with process;
(2) Whether there is any question concerning jurisdiction over the parties and over the subject matter;

(3) Whether all parties plaintiff and defendant have been correctly designated;
(4) Whether any third-party complaint or impleading petition is contemplated;
(5) Whether there is any question concerning misjoinder or nonjoinder of parties;
(6) Whether there is a present need to join other parties or amend the pleadings;
(7) Whether there is a necessity for, or question concerning the validity of, the appointment of a guardian ad litem, next friend, administrator, executor, receiver, or trustee;
(8) Whether there are pending motions;
(9) Whether a trial by jury has been demanded within the time provided by the Federal Rules of Civil Procedure;
(10) Whether a separation of the issues would be feasible or desirable for purposes of trial or discovery;
(11) Whether there are related actions pending or contemplated in this or any other court;
(12) The estimated trial time;
(13) The time reasonably required for the completion of discovery, including identification of experts and discovery with respect thereto.

The stipulations must be signed by all parties, or counsel therefor, and must substantially conform to the suggested form set forth in the Appendix of Forms, Form 1. The parties shall submit to the clerk sufficient copies of the Initial Pretrial Stipulations and Order so that all parties can receive a copy after consideration and action by the court.

Rule 205

Discovery

(a) **Discovery Procedures and Materials.**

(1) Interrogatories or requests for admission shall be numbered consecutively by each party regardless of the number of sets into which they are divided.

(2) Depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless the court so orders or unless the court will need such documents in a pretrial proceeding. All discovery papers must be served on other counsel or parties. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the court when needed or ordered. Any party seeking to compel discovery or other pretrial relief based upon discovery material which has not been filed with the clerk must identify the specific portion of the material which is directly relevant and ensure that it is filed as an attachment to the application for relief.

(b) **Limitation on Use of Interrogatories.** A party may direct no more than 50 interrogatories to any other party, except upon leave granted by the court for good cause shown. Interrogatory parts and subparts shall be counted as separate interrogatories for purposes of this rule.

(c) **Conference of Attorneys With Respect to Motions and Objections Relating to Discovery.** The court will not consider motions and objections relating to discovery unless moving counsel shall first advise the court in writing that after personal consultation and diligent attempts to resolve differences the parties are unable to reach an accord. The statement shall set forth the date of the conference, the names of the participating attorneys and the specific results achieved. It shall be the responsibility of counsel for the movant to arrange for the conference and, in the absence of an agreement to the contrary, the conference shall be held in the office of the attorney nearest the court location where the initial pretrial conference was convened or, in the absence thereof, nearest to Greensboro. Alternatively, at any party's request, the conference may be held by telephone.

(d) **Completion of Discovery.** The requirement that discovery be completed within a specified time means that adequate provision must be made for interrogatories and requests for admission to be answered and for documents to be produced within the discovery period.

(e) **Extension of Time for Discovery.** Motions or stipulations seeking an extension of the discovery period must be made or presented prior to the expiration of the time within which discovery is required to be completed. They must set forth good cause justifying the additional time and will be granted or approved only upon a showing that the parties have diligently pursued discovery.

(f) **Trial Preparation After the Close of Discovery.** For good cause appearing therefor, the physical or mental examination of a party may be ordered at any time prior to trial. Ordinarily, the deposition of a material witness not subject to subpoena should be taken during discovery. However, the deposition of a material witness who agrees to appear at trial, but who later becomes unable or refuses to attend, may be ordered at any time prior to trial.

Rule 206

Time for Filing Dispositive Motions

(a) **Notice of Dispositive Motion.** Any party who intends to file a motion to dismiss or for summary judgment, or any other dispositive motion, must file and serve notice of intention to file a dispositive motion within twenty (20) days following the close of the discovery period.

(b) **Filing of Dispositive Motions.** All dispositive motions must be filed and served within sixty (60) days following the close of the discovery period.

(c) **Failure to Timely File Dispositive Motions.** A dispositive motion which is not noticed and filed within the prescribed time will not delay a scheduled event and will not be reached by the court prior to trial unless the court determines that its consideration will not cause delay to the proceedings.

Rule 207

Final Pretrial Conference

(a) **Conference of Attorneys.** At least fifteen days prior to the final pretrial conference, counsel for each of the parties who will participate in the trial shall meet for the purpose of preparing a final pretrial order. It shall be the duty of counsel for the plaintiff to arrange for the conference. In the absence of an agreement to the contrary, the conference shall be held in the office of the attorney nearest the court location where the initial pretrial conference was convened or, in the absence thereof, nearest to Greensboro. A litigant proceeding pro se must appear at this conference and proceed in accordance with this rule.

(b) **Preparation for the Conference of Attorneys.** In advance of the conference of attorneys, each of the parties shall prepare and have available at the conference, a proposed order which addresses the following:

(1) *Contentions of Plaintiff.* Plaintiff shall have prepared a brief statement of the contentions of plaintiff as to the basis of recovery.

(2) *Contentions of Defendant.* Defendant shall have prepared a brief statement of how defendant expects to defeat recovery and the basis for any asserted counterclaim.

(3) *Contentions of Cross-Claimant or Third-Party Defendant.* Any cross-claimant or third-party defendant shall follow the same procedure required of plaintiff and defendant in regard to disclosure of contentions and with respect to all provisions of this rule.

(4) *Suggested Stipulations.* Each of the parties shall have prepared a list of suggested stipulations covering relevant and material facts not considered to be in genuine dispute.

(5) *Exhibits.* Each of the parties shall have prepared a list of all exhibits with pretrial identification numbers that may be offered by that party at trial. At the conference of attorneys, the parties shall exchange copies of exhibits. In the event that an exhibit cannot feasibly be reproduced, it shall be made available for inspection. Counsel shall discuss and attempt to stipulate the admissibility of each proposed exhibit. If the authenticity or admissibility (except upon objection for relevance or materiality) of any exhibit is not to be stipulated in the final pretrial order, the objection must be stated by counsel with particularity.

During the conference of attorneys, proposed exhibits shall be numbered for pretrial identification only.

(i) If counsel subsequently discovers an exhibit which was not known at the time of the conference of attorneys, counsel shall immediately disclose to the court and to opposing counsel the identity of the exhibit.

(ii) Ordinarily, only exhibits identified in the final pretrial order may be introduced at trial. However, the court may, in its discretion, permit a party to introduce an exhibit not listed in the final pretrial order under such circumstances as the court deems just.

(6) *Witnesses.* Each of the parties shall have prepared a list of the names and addresses of all witnesses who may be offered by that party at the trial, together with a brief statement of what counsel proposes to establish by the testimony of each witness. Only material points of testimony must be disclosed, but failure to disclose a material point may render evidence on that point inadmissible at the trial.

(i) If counsel subsequently discovers the name of a witness who was not known at the time of the attorneys' conference, counsel shall immediately disclose to the court and to opposing counsel the identity of the witness and the material testimony expected from the witness.

(ii) Ordinarily, only witnesses listed by a party in the pretrial order may be called by that party to give testimony at trial. However, the court may, in its discretion, permit a party to call a witness not listed by that or any party under such circumstances as the court deems just.

(iii) If a person is listed as a witness by the plaintiff and by another party, it shall be the responsibility of the plaintiff to produce the witness at the trial. If a person is listed as a witness by a defendant and a party other than the plaintiff, it shall be the responsibility of the defendant to produce the witness at the trial. All listed witnesses subject to subpoena shall be produced at the trial, unless good cause is shown for their absence. Additionally, diligent effort must be made to produce all witnesses not subject to subpoena. If at any time prior to trial, it is determined that a listed witness cannot be produced, immediate notice of such fact must be given opposing counsel.

(iv) If a party lists as a witness an adverse party, or an officer, director, or managing agent of an adverse party, not subject to subpoena, it shall be the responsibility of the adverse party to attend or produce the witness at trial.

(v) If a deposition is to be used at the trial, the individual giving the deposition should be listed as a witness by deposition. Those portions of the deposition which will be offered into evidence must be identified. If opposing counsel disputes the admissibility of the deposition testimony, the basis of the objection must be noted with particularity in the final pretrial order.

(7) *Issues for Trial.* Each party shall have prepared a list of the triable issues for trial. Failure to list an issue will constitute a waiver and abandonment of such issue.

(c) **Discussion of Settlement Possibilities.** At the time of the conference of attorneys, counsel for all parties shall enter into a frank discussion concerning settlement possibilities. Clients should either be consulted in advance of the conference concerning settlement negotiations, or be available for consultation. Settlement prospects will be discussed at the final pretrial conference, and counsel should be fully prepared in this regard. The court will aid in settlement negotiations to the extent deemed appropriate or as may be requested by the parties.

(d) **Preparation of Final Pretrial Order by Plaintiff's Counsel.** At the time of, or immediately following, the conference of attorneys, it shall be the duty of counsel for the plaintiff to prepare a final pretrial order. A copy of the final pretrial order shall be furnished to all opposing counsel and to the court at least five days in advance of the final pretrial conference. The order shall substantially conform to the suggested form of order set forth in the Appendix of Forms, Form 2. All matters addressed in the suggested form shall be addressed in the final pretrial order drawn by counsel, unless the circumstances of the case are such that issues raised in the suggested form are clearly inapplicable to the case at bar.

(e) **The Final Pretrial Conference.** At the final pretrial conference, the court will consider all pending motions and will address such other matters as will facilitate trial of the action. The court will announce requirements with respect to the filing of trial briefs, the filing of requests for jury instructions or proposed findings of fact and conclusions of law, the manner of marking exhibits, and the number of copies of exhibits to be furnished at trial. The court will also set an actual or tentative trial date. Counsel for all parties shall sign the final pretrial order. The order, when approved by the court and filed with the clerk, together with any memorandum entered by the court at the conclusion of the final pretrial conference, will control the subsequent course of the action unless modified by consent of the parties and the court, or by an order of the court to prevent manifest injustice.

(f) **Sanctions.** Should counsel or a pro se litigant fail to appear at the attorneys' conference or the final pretrial conference or fail to comply in good faith with the provisions of this rule, the court may, in its discretion, enter a judgment of dismissal or default. Alternatively, or in addition thereto, the court may impose any sanction provided for in Rule 16(f), Federal Rules of Civil Procedure, or local Rule 122.

Rule 208

Trial Procedure

(a) **Opening Statements in Civil Actions.** At the commencement of the trial of civil actions, the party with the burden of proof may, without argument, state his cause of action and the evidence by which he expects to sustain his claim. The adverse party may then, without argument, state his defense and the evidence by which he expects to sustain his defense. If the trial is to a jury, the opening statement shall be made immediately after the jury is sworn. If the trial is to the court, the opening statement shall be made immediately after the case is called for trial. Opening statements shall be subject to such time limitations as may be imposed by the court.

(b) **Documents, Other than Exhibits, Used at Trial.** When counsel expects to examine or cross-examine a witness concerning a document which will not be offered as an exhibit, counsel shall have at trial a copy of the document for use by the judge or magistrate.

(c) **Absence During Return of Verdict.** In a jury trial, if a party or counsel voluntarily absents himself from the courtroom prior to the return of the verdict, it shall be conclusively presumed that such party or counsel waived his presence.

Rule 209

Taxation of Costs

(a) **Filing Bill of Costs.**

(1) A prevailing party may request the clerk to tax allowable costs in a civil action as a part of a judgment or decree by filing a bill of costs, on a form available in the clerk's office, within 30 days

(i) After the expiration of time allowed for appeal of a final judgment or decree, or

(ii) After receipt by the clerk of an order terminating the action on appeal.

(2) The original of the bill of costs shall be filed with the clerk, with copies served on adverse parties.

(3) The failure of a prevailing party to timely file a bill of costs shall constitute a waiver of any claim for costs.

(b) **Objections to Bill of Costs.**

(1) If an adverse party objects to the bill of costs or any item claimed by a prevailing party, he must state his objection in a motion for disallowance with a supporting brief within 10 days after the filing of the bill of costs. Within 5 days thereafter, the prevailing party may file a response and brief. Unless a hearing is ordered by the clerk, a ruling will be made by the clerk on the record.

(2) A party may request review of the clerk's ruling by filing a motion within 5 days after the action of the clerk. The court's review of the clerk's action will be made on the existing record unless otherwise ordered.

(c) **Taxable Costs.**

(1) Items normally taxed include, without limitation:

(i) Those items specifically listed on the bill of costs form. The costs incident to the taking of depositions (when allowable as necessarily obtained for use in the litigation) normally include only

the reporter's attendance fee and charge for the original transcript of the deposition.
  - (ii) Premiums on required bonds.
  - (iii) Actual mileage, subsistence, and attendance allowances for necessary witnesses at actual cost, but not to exceed the applicable statutory rates, whether they reside in or out of this district.
- (2) Items normally not taxed include, without limitation:
  - (i) Witness fees, subsistence, and mileage for individual parties, real parties in interest, parties suing in representative capacities, and the officers and directors of corporate parties.
  - (ii) Copies of trial transcripts and depositions.
  - (iii) Daily copy of trial transcripts, unless prior court approval has been obtained.

(d) **Costs in Settlements.** The court will not tax costs in any action terminated by compromise or settlement. Settlement agreements must resolve any issue relating to costs. In the absence of specific agreement, each party will bear its own costs.

(e) **Payment of Costs.** Costs are to be paid directly to the party entitled to reimbursement, who must file a certificate of satisfaction within 20 days of receipt of payment.

Rule 210

Award of Statutory Attorney's Fees

The court will not consider a motion to award statutory attorney's fees until moving counsel shall first advise the court in writing that after consultation the parties are unable to reach an agreement in regard to the fee award. The statement of consultation shall set forth the date of the consultation, the names of the participating attorneys, and the specific results achieved.

If the parties reach an agreement, they shall file an appropriate stipulation and request for an order. If they are unable to agree, the moving party shall file the statement of consultation required by this rule and a motion setting forth the factual basis for each criterion which the court will consider in making an award. The motion shall be supported by time records, affidavits, or other evidence.

CASE NOTES

Cited in Coburn Optical Indus., Inc. v. Cilco, Inc., 610 F. Supp. 656 (M.D.N.C. 1985).

Rule 211

Injunctions and Temporary Restraining Orders

(a) **Form of Application.** A prayer for a temporary restraining order or preliminary injunction set forth in a pleading will not bring the issue before the court prior to the time of trial. If a ruling before trial is desired, a party must separately file a motion and brief.

(b) **Hearing.** A motion seeking a preliminary injunction will be considered and determined on the official court file including affidavits, briefs and other documents filed in support thereof without oral argument or testimony unless otherwise ordered by the court. A request for leave to present oral argument or testimony in support of or in opposition to such motion must be included in the motion or response.

Rule 212

Class Actions

(a) **Class Action Complaint.** The complaint shall bear next to its caption the legend, "Complaint — Class Action." The complaint shall contain under a separate heading, styled "Class Action Allegations":

(1) A reference to the portion or portions of Rule 23, Fed. R. Civ. P., under which it is claimed that the suit is properly maintainable as a class action.

(2) Appropriate allegations thought to justify such claim, including, but not necessarily limited to:

  (i) The size and definition of the alleged class,

  (ii) The basis upon which the plaintiff claims

    (A) To be an adequate representative of the class, or

    (B) If the class is comprised of defendants, that those named as parties are adequate representatives of the class.

  (iii) The alleged questions of law or fact claimed to be common to the class, and

  (iv) For actions sought to be maintained under Rule 23(b)(3), Fed. R. Civ. P., allegations thought to support the findings required by that subdivision.

(b) **Motion for Class Action Determination.** Within 90 days after the filing of a complaint in a class action, unless this period is extended by court order, the plaintiff shall file a separate motion for a determination under Rule 23(c)(1), Fed. R. Civ. P., as to whether the case may be maintained as a class action. If a party wishes to present oral testimony to support the class action motion, he must so inform the court in his motion. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the court for renewal of the motion.

(c) **Class Action Counterclaims or Cross-Claims.** The foregoing provisions shall apply, with appropriate adaptations, to any counterclaim or cross-claim alleged to be brought for or against a class.

(d) **Burden of Proof; Notice.** The burden shall be upon any party seeking to maintain a case as a class action to present an evidentiary basis to the court showing that the action is properly maintainable as such. If the court determines that an action may be maintained as a class action, the party obtaining that determination shall initially bear the expenses of and be responsible for giving such notice as the court may order to members of the class.

Rule 213

Minors and Incompetents as Parties

(a) **Capacity to Sue or Be Sued.** Minors and incompetent persons may sue or defend only by their general or testamentary guardians within this state or by guardians ad litem appointed by this court.

(b) **Appointment of Guardian ad litem.**

(1) Application for the appointment of a guardian ad litem to sue on behalf of a minor or incompetent may be made by motion submitted contemporaneously with a complaint. The complaint may be filed when the appointment is made by a judge or magistrate.

(2) Application for the appointment of a guardian ad litem to defend on behalf of a minor or incompetent person may be filed after service of summons and complaint and before time has expired to answer or otherwise to respond.

(3) Applications for the appointment of a guardian ad litem by this court must:

(i) Set out facts requiring such appointment,

(ii) Suggest a natural person suitable for appointment,

(iii) Contain information about that person, including willingness to serve, upon which the court can judge his or her qualifications, and

(iv) Be accompanied by a proposed order of appointment.

(c) **Termination of Actions; Court Hearing and Approval.**

(1) No civil action or proceeding in which a minor or incompetent person is a party may be compromised, settled, dismissed, or otherwise terminated without the approval of the court.

(2) In order to obtain court approval, a party must file a motion setting forth reasons justifying the termination and explaining its effect upon the rights of the minor or incompetent person.

(3) The court will conduct a hearing to determine whether the termination is fair, reasonable, and in the best interest of the minor or incompetent. The following persons must be present at the hearing unless excused by the court:

(i) Attorneys for all parties,

(ii) The minor or incompetent party,

(iii) The guardian ad litem or other legal representative, and

(iv) A parent or other person in loco parentis.

(4) At the hearing the parties must establish to the satisfaction of the court:

(i) The facts giving rise to the cause of action and the contentions of the parties with respect to liability and damage;

(ii) The facts concerning the nature and extent of any injury or damage suffered by the minor or incompetent person, supported by medical records and reports in personal injury cases;

(iii) Medical and hospital expenses, if any, incurred or likely to be incurred;

(iv) The concurrence of the attorney, guardian ad litem or other legal representative that the proposed settlement is fair, reasonable, and in the best interest of the minor or incompetent person;

(v) The facts with respect to any related claims or liens, including separate claims of parents for expenses, and the disposition or status of such other claims.

(5) Ordinarily, the requirements of section (c)(4) of this rule may be satisfied by summaries made by the parties or their attorneys. In every

case, the parties may present sworn testimony of witnesses, affidavits or documentary evidence, and the court reserves the right to call for such evidence at any time.

(d) **Fees.** At the hearing, the court will consider requests for counsel fees and a fee for services by the guardian ad litem or other legal representative and may make appropriate orders relating to payment of fees.

(e) **Consent Judgments Approving Settlement.**

(1) Before a judgment approving a compromise settlement of claims of a minor or incompetent is presented to the court, it shall be consented and agreed to by counsel for the parties to the action and by the guardian ad litem or other legal representative of the minor or incompetent.

(2) The judgment presented should provide, inter alia, that the parties have agreed to a settlement of all matters in controversy between them and the amount of the settlement; that the court has conducted a hearing on the matter; that the court has found that the proposed compromise settlement is fair, reasonable, and in the best interest of the minor or incompetent; and that the court has approved the compromise settlement agreement.

(f) **Payment of Judgment.** The amount of the judgment shall be paid into the office of the clerk of this court, and the clerk shall make such disbursements from the proceeds as provided by the judgment of the court. The balance of the proceeds of the judgment shall be paid to the legal guardian of the minor or incompetent, if within this state. If there is no such guardian, the balance of the proceeds shall be paid to the clerk of superior court of the county in this state in which the minor or incompetent resides. If the minor or incompetent does not reside within this state, the balance shall be paid to a legal guardian approved by the court.

Rule 214

Claim of Unconstitutionality; Three-Judge Courts

(a) **Notification.** If any any time prior to the trial of an action to which (1) neither the United States nor any of its officers, agencies, or employees is a party and a party draws in question the constitutionality of an Act of Congress affecting the public interest, or (2) neither the state or any of its agencies, officers, or employees is a party and a party draws in question the constitutionality of any statute of that state affecting the public interest, that party, to enable the court to comply with 28 U.S.C. § 2403, shall notify the court. The notice shall be in writing, stating the title of the action, the statute in question, and the respects in which it is claimed the statute is unconstitutional and a copy shall be served upon the Attorney General of the United States and the United States Attorney in this district or the North Carolina Attorney General, as applicable.

(b) **Additional Copies.** In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges, all pleadings, papers, and documents filed subsequent to the designation of the court, as provided in 28 U.S.C. § 2284(a), shall be filed in triplicate, original and two copies, with the clerk. The clerk shall make timely distribution of these documents to the designated judges.

Rule 215

Settlement

Attorneys or pro se litigants shall immediately notify the clerk of an agreement in principle reached by the parties which resolves the litigation as to any or all parties.

Rules 216-299

[Reserved for future purposes]

III. Criminal Rules

Rule 301

Prompt Disposition of Criminal Cases

The Court's Plan for the Prompt Disposition of Criminal Cases in compliance with Rule 50(b) of the Federal Rules of Criminal Procedure, the Speedy Trial Act of 1974 (18 U.S.C. § 3161, et seq.), and the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5036, 5037), as approved by the Judicial Council, is a public document available through the office of the clerk of this court. The Court's Plan for the Prompt Disposition of Criminal Cases as it now exists and as it is hereafter amended and approved by the Judicial Council shall have the same force and effect as a local rule of this court.

Rule 302

Pretrial Motions in Criminal Cases

(a) **Time for Filing.** The time for filing pretrial motions and responses thereto shall be set by the court at arraignment in all cases in which a defendant pleads not guilty.

(b) **Extension of Time for Filing.** Motions for an extension of time to file pretrial motions must be made within the time set for the filing of motions and will be granted only upon a showing of good cause for delay.

(c) **Motions Adopting Other Motions.** Motions adopting motions filed by codefendants must clearly identify by character and date of filing the motions adopted. General adoptions which do not identify specifically the motions adopted may be summarily denied by the court.

(d) **Discovery Motions.** Discovery motions filed by a defendant who is represented by counsel must include a statement that counsel has fully reviewed the government's case file before bringing the motion or a statement that such file is not available for counsel's review. The filing of a discovery motion which does not include such certification may cause the court to deny the motion, to disapprove payment to court-appointed counsel in regard to a motion made unnecessary by examination of the file, or to impose other sanctions under local Rule 122 in the discretion of the court.

Rule 303

Representation of Certain Defendants

The Court's Plan for Furnishing Representation and Services to defendants who are financially unable to obtain an adequate defense, pursuant to the Criminal Justice Act of 1964, as amended, is a public document available through the office of the clerk of this court. The court's plan as it now exists and as it is hereinafter amended shall have the same force and effect as a local rule of this court. When deemed appropriate by the court, the court may appoint an attorney to represent a defendant even though such attorney's name does not appear on the panel of attorneys drawn pursuant to the plan.

Rule 304

Payment of Fixed Sum in Lieu of Appearance in Certain Misdemeanor Cases

Pursuant to Rule 4(a), Rules of Procedure for Trial of Misdemeanors Before United States Magistrates, and in the interest of justice and good court administration, collateral may be posted in lieu of the appearance of an offender for certain misdemeanors under federal statutes and regulations or state statutes made applicable by the Assimilative Crimes Statute (18 U.S.C. § 13). There shall be maintained in the office of the clerk a list of the misdemeanors and fines applicable thereto for which forfeiture of collateral security may be posted.

The posting of collateral signifies that the defendant does not contest the charge nor request a trial. Such collateral shall be administratively forfeited to the United States. Forfeiture of collateral in lieu of personal appearance is not permitted for any listed offense denominated a "mandatory appearance" offense, for an aggravated or major offense, or for multiple offenses arising out of the same facts or sequence of events.

The clerk shall certify the record of any forfeiture of collateral for a traffic violation to the proper state authority.

Rule 305

Fair Trial Directives

(a) **Prohibited Statements; Attorney's Obligations.**

(1) An attorney participating in or associated with a grand jury or other investigation of a criminal matter shall not make or participate in making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication and which does more than state without elaboration:

(i) Information contained in a public record.

(ii) That the investigation is in progress.

(iii) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(iv) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(v) A warning to the public of any dangers.

(2) An attorney associated with the prosecution or defense of a criminal case to be tried by a jury shall not make or participate in making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication which relates to:
- (i) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
- (ii) The possibility of a plea of guilty to the offense charged or to a lesser offense.
- (iii) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
- (iv) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
- (v) The identity, testimony, or credibility of a prospective witness.
- (vi) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(3) Section (a)(2) above does not preclude an attorney from announcing:
- (i) The name, age, residence, occupation, and family status of the accused.
- (ii) Any information necessary to aid in the apprehension of an accused or to warn the public of any dangers he may present.
- (iii) A request for assistance in obtaining evidence.
- (iv) The identity of the victim of the crime.
- (v) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
- (vi) The identity of investigating and arresting officers or agencies and the length of the investigation.
- (vii) The nature, substance, or text of the charge.
- (viii) Quotations from or references to public records of the court in the case.
- (ix) The scheduling or result of any step in the judicial proceedings.
- (x) That the accused denies the charges made against him.

(4) The foregoing provisions of this rule do not preclude an attorney from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(b) **Attorney's Employees and Associates.** An attorney must exercise reasonable care to prevent his employees and associates from making any extrajudicial statement which the attorney would be prohibited from making under this rule.

Rules 306-399

[Reserved for future purposes]

IV. Magistrate Rules

Rule 401

Authority of Magistrates

(a) **Designation to Conduct Trials and to Perform Other Duties.**

(1) Magistrates are authorized and designated to exercise the powers and authority and to perform the duties enumerated in 28 U.S.C. § 636(b)(1) and (2).

(2) Magistrates serving this court are specially designated to:

(i) Exercise civil jurisdiction to conduct any or all proceedings in jury or nonjury cases and order the entry of judgment in any case referred to them for that purpose, pursuant to 28 U.S.C. § 636(c), and

(ii) Exercise jurisdiction to try persons accused of, and sentence persons convicted of, criminal misdemeanors.

(b) **Authority to Perform Additional Duties.** Pursuant to 28 U.S.C. § 636(b)(3), magistrates are authorized to perform additional functions and duties, including the following:

(1) Conduct pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings;

(2) Conduct calendar and status calls for civil and criminal calendars, and determine motions to expedite or postpone the trial of cases;

(3) Conduct arraignments in cases not triable by the magistrate to the extent of taking a not guilty plea or noting a defendant's intention to plead guilty or nolo contendere and ordering a presentence report in appropriate cases;

(4) Conduct voir dire and select petit juries for the court;

(5) Accept petit jury verdicts in civil cases in the absence of a judge;

(6) Conduct preliminary proceedings relating to the potential revocation of probation;

(7) Issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings;

(8) Order the exoneration or forfeiture of bonds;

(9) Conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);

(10) Conduct examinations of judgment debtors, in accordance with Rule 69 of the Federal Rules of Civil Procedure;

(11) Review petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act;

(12) Conduct such hearings as are necessary or appropriate, and submit to a judge proposed findings of fact and recommendations for disposition of applications for judgment by default pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, or motions to set aside judgments by default pursuant to Rule 55(c) of the Federal Rules of Civil Procedure;

(13) Consider an application by a complainant pursuant to 42 U.S.C. § 2000e-5(f)(1), and in such circumstances as may be deemed just, appoint an attorney for such complainant, and authorize the commencement of an action without payment of fees, costs, or giving security therefor;

(14) Issue orders or warrants authorizing acts necessary in the performance of the duties of administrative and regulatory agencies and departments of the United States government;

(15) Conduct extradition proceedings, in accordance with 18 U.S.C. § 3184;

(16) Supervise proceedings conducted pursuant to letters rogatory, in accordance with 28 U.S.C. § 1782;

(17) Require compliance with local rules with regard to pro se petitions under 42 U.S.C. § 1983;

(18) Issue orders of withdrawal from the court registry of funds pursuant to 28 U.S.C. § 2042; and

(19) Perform any additional duty which is not inconsistent with the Constitution and laws of the United States.

Rule 402

Consent to Civil Trial Jurisdiction

(a) **Consent to Exercise of Civil Jurisdiction.**

(1) The consent of a party to the exercise of civil jurisdiction authorized in 28 U.S.C. § 636(c)(1) may be communicated to the clerk by letter, or by a form available in the clerk's office, signed by the party or his attorney.

(2) The consent shall be communicated to the clerk prior to the time of trial. The consent may not be limited to trial by a particular magistrate.

(3) The consent of a party will be placed in the public court file only when the court has ordered the case referred to a magistrate.

(4) Parties intervening by permission after reference are deemed to have consented.

(b) **Withdrawal of Consent.** After a case has been referred, the consent of the parties to the exercise of a magistrate's jurisdiction may not be withdrawn without the approval of the court.

(c) **Reference Discretionary.** Reference of a case to a magistrate after the consent of all parties is within the discretion of the court.

Rule 403

Consent to Designation of Magistrate as a Special Master

(a) **Consent.** Upon the written consent of the parties, a magistrate may be designated to serve as a special master in any civil proceeding without a showing of exceptional conditions or that the issues are complicated.

(b) **Reference.** Reference of a case to a magistrate as a special master is within the discretion of the court, but the consent of the parties may not thereafter be withdrawn without approval of the court.

Rule 404

Assignment of Matters to Magistrates

Duties and cases may be assigned or referred to a magistrate by a court order entered in the action or by the clerk in compliance with standing orders or the instructions of a judge.

Rule 405

Objections; Appeals; Stay of Order

(a) **Objections to Magistrate's Order.** The procedure for filing objections to an order in a nondispositive matter shall be as set forth in Rule 72(a), Fed. R. Civ. P.

(b) **Objections to Magistrate's Recommendation.** The procedure for filing objections to a recommendation on a dispositive or other matter shall be as set forth in Rule 72(b), Fed. R. Civ. P.

(c) **Appeal from Judgment.** The procedure for appeal from a judgment in an action tried by consent to a magistrate shall be as set forth in Rules 73 through 76, Fed. R. Civ. P.

(d) **Application for Stay of Magistrate's Order.** Application for stay of a magistrate's order pending review of objections made thereto must first be made to the magistrate.

Rules 406-499

[Reserved for future purposes]

V. Rules of Disciplinary Enforcement

Rule 501

Purpose of Disciplinary Rules

The court, in furtherance of its inherent power and responsibility to supervise attorneys who practice before it, adopts these rules of disciplinary enforcement.

Rule 502

Attorneys Convicted of a Crime

(a) **Suspension Upon Filing of Judgment.** Upon the filing of a certified copy of a judgment of conviction demonstrating that any attorney practicing before the court has been convicted in any court of the United States, or the District of Columbia, or of any state, territory, commonwealth or possession of the United States, of a serious crime as herein defined, the court may enter an order immediately suspending that attorney from practice until final disposition of a disciplinary proceeding before this court, or until final disposition is made by the appropriate state bar.

(b) **Definition of Serious Crime.** "Serious crime" shall include any felony and also any other crime which involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy of solicitation of another to commit a "serious crime."

(c) **Conviction of Serious Crime.** Upon the filing of a certified copy of a judgment of conviction of an attorney for a serious crime, the court may refer the matter to counsel for institution of a disciplinary proceeding before the court, providing that a disciplinary proceeding so instituted will not be brought to final hearing until all appeals from the conviction are concluded. Alternatively, the court may refer the matter to the appropriate state bar.

(d) **Conviction of Other Crime.** Upon the filing of a certified copy of a judgment of conviction of an attorney for a crime not constituting a "serious crime," the court may refer the matter to counsel for whatever action counsel may deem warranted, including the institution of a disciplinary proceeding before the court. Alternatively, the court may refer the matter to the appropriate state bar.

(e) **Reinstatement After Suspension.** An attorney suspended under the provisions of this rule will be reinstated immediately upon the filing of a certificate demonstrating that the conviction of a serious crime has been reversed, but the reinstatement will not terminate any disciplinary proceeding then pending, the disposition of which shall be determined by the court on the basis of all available evidence pertaining to both guilt and the extent of discipline to be imposed.

Rule 503

Discipline Imposed by Another Court or by a State Bar

(a) **Duty to Inform the Clerk.** Any attorney practicing before this court shall, upon being subjected to public discipline by any court or by the state bar of any state, promptly inform the clerk of such action.

(b) **Show Cause Order.** Upon the filing of a certified copy of a judgment or order demonstrating that an attorney has been disciplined by another court or by a state bar, this court shall forthwith issue a notice containing a copy of the judgment or order and an order to show cause directing that the attorney inform this court within 20 days why imposition of the identical discipline by this court would be unwarranted and the reasons therefor.

(c) **Imposition of Discipline.** Upon expiration of 20 days from service of the show cause order, this court will presume the misconduct to have been established and will impose the identical discipline unless the attorney demonstrates that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

(1) That the attorney was deprived of due process; or

(2) That there was such an infirmity of proof that this court could not accept as final the conclusion on that subject; or

(3) That the imposition of the same discipline by this court would result in grave injustice; or

(4) That the misconduct established is deemed by this court to warrant substantially different discipline.

Where this court determines that any of said elements exist, it shall enter such order as it deems appropriate. The grant of a stay of discipline by the other jurisdiction shall constitute grounds for a similar grant by this court.

Rule 504

Disbarment on Consent or Resignation in Another Court or Before a State Bar

Any attorney practicing before this court who shall be disbarred on consent or resign from the bar of any court or state while an investigation into allegations of misconduct is pending, shall promptly inform the clerk, and upon the filing with this court of a certified copy of the judgment or order accepting such disbarment on consent or resignation, shall cease to be permitted to practice before this court.

Rule 505

Standards for Professional Conduct

(a) **Disciplinary Enforcement.** For misconduct defined in these rules, and after notice of an opportunity to be heard, any attorney practicing before this court may be disbarred, suspended from practice, reprimanded, or subjected to such other disciplinary action as the circumstances may warrant.

(b) **Standards for Conduct.** Acts or omissions by an attorney practicing before this court which violate the Code of Professional Responsibility adopted by this court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility adopted by the Supreme Court of North Carolina, as amended from time-to-time by that state court, except as otherwise provided by a specific rule of this court.

Rule 506

Disciplinary Proceedings

(a) **Referral of Complaints to Counsel or to a State Bar.** When allegations of misconduct by an attorney practicing before this court come to the attention of a judge of this court, whether by complaint or otherwise, the judge may refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate. Alternatively, the judge may refer the matter to the appropriate state bar.

(b) **Recommendation by Counsel.** Should counsel conclude after investigation that a formal disciplinary proceeding should not be initiated against the attorney, counsel shall file with the court a recommendation for disposition of the matter, whether by dismissal, admonition, or deferral and shall set forth the reasons for such recommendation.

(c) **Initiation of Disciplinary Proceedings.** To initiate formal disciplinary proceedings, counsel shall obtain an order of the court upon a showing of probable cause requiring the attorney to show cause within 20 days after service of the order why the attorney should not be disciplined.

(d) **Hearing.** Upon the attorney's answer to the order to show cause, if any issue of fact is raised or the attorney wishes to be heard, the court shall set the matter for prompt hearing.

Rule 507

Disbarment on Consent While Under Disciplinary Investigation or Prosecution

(a) **Consent to Disbarment.** Any attorney practicing before this court who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may consent to disbarment by delivering to this court an affidavit stating that the attorney desires to consent to disbarment and that:

(1) His consent is freely given,
(2) He is aware of the pending investigation or proceeding,
(3) He acknowledges the material facts of misconduct, and
(4) He consents because he knows that he could not defend himself successfully against charges of misconduct.

(b) **Order of Disbarment.** Upon receipt of the required affidavit, this court shall enter an order disbarring the attorney.

(c) **Record.** The order disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of this rule shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court.

Rule 508

Reinstatement

(a) **Automatic Reinstatement; Reinstatement by Order.** An attorney suspended for 3 months or less shall be automatically reinstated at the end of the period of suspension upon filing with the court an affidavit of compliance with the provisions of the suspension order. An attorney suspended for more than three months or disbarred may not resume practice until reinstated by order of this court.

(b) **Time for Petition.** An attorney who has been disbarred after hearing or by consent may not petition for reinstatement until the expiration of at least 5 years from the effective date of disbarment.

(c) **Procedure.** Petitions for reinstatement by a disbarred or suspended attorney under this rule shall be filed with the court. Upon receipt of the petition, the chief judge shall assign the matter for a prompt hearing before a judge (or judges) of the court and may, in his discretion, refer the petition to counsel for investigation. The judge assigned to the matter shall schedule a hearing at which petitioner shall have the burden of demonstrating by clear and convincing evidence that he has the moral qualifications, competency and learning of the law required for admission to practice law before this court, and that his resumption of the practice of law will not be detrimental to the integrity and standing of the bar or the administration of justice or subversive of the public interest. In all proceedings upon a petition for reinstatement, cross-examination of the witnesses of the attorney and the submission of evidence, if any, in opposition to the petition shall be conducted by counsel if the matter has been referred to counsel by the court.

(d) **Costs.** Petitions for reinstatement under this rule shall be accompanied by an advanced cost deposit in an amount to be set from time-to-time by the court to cover anticipated costs of the reinstatement proceeding.

(e) **Order of Reinstatement.** If the petitioner is found to be unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found to be fit to resume the practice of law, the judgment shall reinstate him, provided that the judgment may make reinstatement conditional upon the payment of all or part of the costs of the proceedings, and upon the making of partial or complete restitution to parties harmed by the petitioner whose conduct led to the suspension or disbarment. Provided further, that if the petitioner has been suspended or disbarred for 5 years or more, reinstatement may be conditioned, in the discretion of the judge, upon the furnishing of proof of competency and learning in the law, which proof may include certification by the bar examiners of North Carolina of the attorney's successful completion of an examination for admission to practice subsequent to the date of suspension or disbarment.

(f) **Successive Petitions.** No petition for reinstatement under this rule shall be filed within 1 year following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same person.

Rule 509

Attorneys Specially Appearing

Whenever an attorney appears for purposes of a particular proceeding, the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon this court for any alleged misconduct of that attorney arising in the course or in the preparation for such proceeding.

Rule 510

Service of Papers and Other Notices

Service of an order to show cause instituting a formal disciplinary proceeding shall be made by personal service or by registered or certified mail addressed to the attorney. Service of any other papers or notices required by these rules shall be deemed to have been made if such paper or notice is addressed to the attorney or to his counsel and is posted by regular mail.

Rule 511

Appointment of Counsel

Whenever counsel is to be appointed by these rules to investigate allegations of misconduct or to prosecute disciplinary proceedings or in conjunction with a reinstatement petition, the court shall appoint as counsel the disciplinary agency of the Supreme Court of North Carolina or any other disciplinary agency having jurisdiction. If no such agency exists or it declines appointment, or such appointment is clearly inappropriate, the court shall appoint as counsel one or more members of the Bar; provided, however, that the respondent-attorney may move to disqualify an attorney so appointed who is or who has been engaged as an adversary of the respondent-attorney in any manner. Counsel, once appointed, may not resign unless permission to do so is given by the court.

Rule 512

Duties of the Clerk

(a) **Obtaining Certificate of Conviction.** Upon being informed that an attorney practicing before this court has been convicted of any crime, the clerk shall determine whether the clerk of the court in which such conviction occurred has forwarded a certificate of such conviction to this court. If certificate has not been so forwarded, the clerk shall promptly obtain a certificate and file it with this court.

(b) **Obtaining Certificate of Disciplinary Judgment or Order.** Upon being informed that an attorney practicing before this court has been subjected to discipline by another court or a state bar, the clerk shall determine whether a certified copy of the disciplinary judgment or order has been filed with this court, and, if not, the clerk shall promptly obtain a certified copy of the disciplinary judgment or order and file it with this court.

(c) **Clerk to Inform Other Jurisdictions.** Whenever it appears that any attorney convicted of any crime, disbarred, suspended, censured, or disbarred on consent by this court is admitted to practice law in any other jurisdiction or before any other court, the clerk shall, within 10 days of that conviction, disbarment, suspension, censure, or disbarment on consent, transmit to the disciplinary authority in such other jurisdiction, or for such other court, a certificate of the conviction or a certified copy of the judgment or order of disbarment, suspension, censure, or disbarment on consent, as well as the last known office and residence addresses of the attorney.

(d) **Clerk to Inform the National Discipline Data Bank.** The clerk shall, likewise, promptly notify the National Discipline Data Bank operated by the American Bar Association of any order imposing public discipline upon any attorney practicing before this court.

Rule 513

Jurisdiction

Nothing contained in these rules shall be construed to deny to this court such powers as are necessary for the court to maintain control over proceedings conducted before it, such as proceedings for contempt under Title 18 of the United States Code or under Rule 42 of the Federal Rules of Criminal Procedure or other sanctions under the Federal Rules of Civil Procedure or these local rules.

Rules 514-599

[Reserved for future purposes]

VI. COURT-ANNEXED ARBITRATION

Rule 601

Purpose of Court-Annexed Arbitration

These rules govern reference of selected actions to nonbinding arbitration. Their purpose is to provide for the speedy, fair, and economical resolution of controversies by informal procedures while preserving the right of all parties to a conventional trial.

The arbitration program created by these rules is administered by the court in association with the Private Adjudication Center, Inc., Duke University School of Law. The Private Adjudication Center provides the court with a resource for administration, research and evaluation of arbitration procedures.

Rule 602

Cases to be Referred to Arbitration

(a) **Mandatory Reference to Nonbinding Arbitration.** Unless the court exempts a case from mandatory arbitration, the court shall refer to nonbinding arbitration any civil action, if:

(1) the monetary relief sought does not exceed $150,000.00, exclusive of punitive damages, statutory multiple damages, costs, and interest. Under these rules, the relief sought shall be presumed not to exceed $150,000.00 unless counsel for plaintiff, or counsel for defendant with respect to any counterclaim, files a document which certifies that to the best of counsels' knowledge, information and belief, reached in good faith and after reasonable inquiry, the monetary relief in issue exceeds $150,000.00;

(2) the case is neither a class action nor a case pending on a multi-district docket; and

(3) the action is one:

(i) where the United States is a party and the action arises:

(A) under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b); 2671, *et seq.*);

(B) under the Longshoreman's and Harbor Workers' Compensation Act (33 U.S.C. § 905); or

(C) under the Miller Act (Sec. 2 of Act, August 24, 1935, as amended, Title 40 U.S.C. § 270(b); or

(ii) where the United States is not a party, jurisdiction is premised upon 28 U.S.C. §§ 1331, 1332, 1333, or 1335, and recovery is sought:

(A) for injury or death of a seaman under the Jones Act (46 U.S.C. § 688);

(B) based on a negotiable instrument or a contract;

(C) for personal injury or property damage;

(D) for personal injury under the Federal Employers Liability Act (45 U.S.C. § 51, *et seq.*).

(b) **Exemption From Mandatory Arbitration.** The court may exempt a case from mandatory arbitration if it finds that the case does not fall within the categories set forth in Rule 602(a) or that:

(1) the legal issues presented are unusually complex or novel;

(2) the legal issues predominate over factual issues;
(3) the action includes a material claim for declaratory or injunctive relief;
(4) the monetary relief sought appears, on the basis of a certificate of counsel as described in Rule 602(a)(1), to exceed $150,000.00; or
(5) mandatory arbitration will not likely accomplish the purpose of these rules stated in Rule 601.

A party may request exemption by filing with the court a motion for exemption within twenty (20) days after entry of the initial pretrial order, or any other order, which selects the case for arbitration. A response to the motion may be filed within ten (10) days thereafter. The court may determine the motion with or without a hearing. The filing of a motion for exemption does not serve to stay discovery or extend any other deadline set by these rules or court order.

(c) **Voluntary Reference to Nonbinding Arbitration.** The court may refer to nonbinding arbitration under these rules any civil action upon consent of the parties.

(d) **Binding Arbitration.** In any civil action, the parties may agree that the case be referred to binding arbitration under the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*). The order of reference shall specify agreements of the parties with respect to conduct of the arbitration and payment of the arbitrator.

Rule 603

Preliminary Procedure

(a) **Initial Pretrial Order.** Within fifteen (15) days after the issues are joined, or as soon thereafter as is practicable, the clerk shall, in each case subject to mandatory arbitration pursuant to Rule 602(a), enter an initial pretrial order which:
(1) selects the case for arbitration;
(2) establishes a twenty day deadline for the filing of motions for leave to amend pleadings or to join parties;
(3) establishes a three month deadline for the conduct of discovery; and
(4) notifies the parties of their opportunity to select an agreed upon arbitrator. The parties may select an arbitrator from the list of arbitrators maintained by the Private Adjudication Center, or they may select any other person, whether or not an attorney, on the basis of that person's expertise or experience. To select an agreed upon arbitrator, the parties must file with the Private Adjudication Center a statement identifying the arbitrator within fifteen (15) days after entry of the initial pretrial order.

(b) **Discovery.** Discovery shall proceed as in any other civil action. The court will require that discovery be accomplished in a diligent and expeditious fashion.

(c) **Dispositive Motions.** In a case selected for mandatory arbitration, summary judgment and other dispositive motions will not be ruled upon by the court, and need not be filed, until the case has proceeded through an arbitration hearing and has returned to the court calendar in accordance with Rule 610.

Rule 604

Arbitrators

(a) **Certification.** The Private Adjudication Center shall receive applications from attorneys who agree to serve as arbitrators. From time-to-time, the Center shall submit to the Chief Judge applications of attorneys for certification pursuant to section (b)(3) of this rule. The Center shall maintain a list of certified arbitrators, showing the name, address, telephone number, and professional affiliation of each arbitrator. The Center shall also maintain a file of resumés for the arbitrators, each resumé to contain a short professional history of the arbitrator.

(b) **Eligibility.** Any individual may be certified to serve as an arbitrator if:

(1) The person has been for at least eight years a member of the bar of the highest court of any state or the District of Columbia; and

(2) The person is either a member of the bar of this court or a member of the faculty of an accredited law school within North Carolina, and

(3) The person is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

(c) **Oath or Affirmation.** Each arbitrator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as an arbitrator. A written statement made under penalty of perjury and filed with the Private Adjudication Center will satisfy this requirement.

(d) **Compensation and Expenses of Arbitrators.** Arbitrators shall be reimbursed for travel, telephone, and postage expenses in connection with arbitration proceedings. They shall be compensated as follows:

(1) At the rate of $40.00 per hour, up to a maximum of $150.00, for work performed prior to the arbitration hearing;

(2) At the rate of $100.00 for each half day, up to three hours, and $250.00 for each full day (in excess of three hours) on which an arbitration hearing is held, up to a maximum of $500.00, and

(3) At the rate of $40.00 per hour, up to a maximum of $40.00, for time spent in a posthearing conference pursuant to Rule 610(c).

Arbitrators shall submit vouchers to the clerk who shall administer all payments made under these arbitration rules.

Rule 605

Selection of the Arbitrator

(a) **Selection by Agreement.** If the parties file with the Private Adjudication Center a timely statement pursuant to Rule 603(a)(4), identifying an agreed upon arbitrator, the clerk of court shall thereupon appoint such person as the arbitrator and give notice of the appointment to the arbitrator and the parties.

(b) **Selection by the Private Adjudication Center.** If no timely statement pursuant to Rule 603(a)(4) is filed, the Private Adjudication Center shall send to each party a list of 5 proposed arbitrators, with resumes enclosed. The Center shall notify each party of its right to strike two proposed arbitrators. (If more than two parties appear in the litigation, the Private Adjudication Center shall submit a larger list of proposed arbitrators, so that the list is one greater than the total number of arbitrators who may be stricken.) Within 15 days of the Center's mailing of the list of proposed arbitrators, each party may file with the Private Adjudication Center a statement striking two proposed arbitrators. From the proposed arbitrators who have not been stricken, the Private Adjudication Center shall designate an arbitrator, who shall be appointed by the clerk of court, and give notice of the appointment to the arbitrator and the parties.

(c) **Disqualification.** On motion made to the court no later than twenty (20) days before a scheduled arbitration hearing, an arbitrator may be disqualified by the court for bias or prejudice as provided in 28 U.S.C. § 144. Further, an arbitrator shall disqualify himself if he could be required to do so under 28 U.S.C. § 455 if he were a justice, judge, or magistrate. (Amended December 20, 1984, eff. January 1, 1985.)

Rule 606

Reference and Scheduling Order

(a) **Order.** After the close of the discovery period, the clerk shall enter a Reference and Scheduling Order which:

(1) orders the case referred to the Private Adjudication Center for the conduct of an arbitration hearing in accordance with these rules;
(2) establishes a sixty (60) day deadline for the conduct of the arbitration hearing. The arbitrator shall schedule the actual date and time of the hearing after consultation with the clerk and the parties; and
(3) establishes the place of the hearing, generally to be a lawyers' conference room or courtroom within a United States courthouse, except that the arbitrator may move the hearing to another location after consultation with the clerk and the parties.

(b) **Copies of Court Papers.** The clerk shall send to the Private Adjudication Center a complete copy of the court file for use by the Center and the arbitrator in conducting the arbitration proceedings.

(c) **Continued Authority of the Court.** Notwithstanding reference of cases to the Private Adjudication Center, every civil action shall remain at all times subject to the authority and control of the court.

Rule 607

Arbitration Procedure

(a) **No Ex Parte Communication.** There shall be no ex parte communication between the arbitrator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the arbitrator from discussing substantive issues in the case with all parties present or from assisting settlement negotiations between the parties at any time following his appointment.

(b) **Prehearing Exchange of Information.** No later than ten (10) days prior to the hearing date, each party shall file with the Private Adjudication Center and serve on the arbitrator and other parties a statement which sets forth for such party the following information:

(1) identification of the issues to be determined;
(2) identification of all witnesses to be called at the arbitration hearing; and
(3) identification of all exhibits to be presented at the hearing.

Each party may, at the same time, file and serve a prehearing brief. Statements and briefs filed with the Private Adjudication Center under this rule are not to be filed with the court.

(c) **Record.** No official record of the arbitration hearing will be made. Any party desiring the attendance of a reporter shall make the necessary arrangements with a reporting agency. The costs of the reporter's attendance fee, record, and all transcripts thereof, shall be prorated equally among all parties ordering copies, unless they shall otherwise agree, and shall be paid for by the responsible parties directly to the reporting agency.

(d) **Subpoenas.** Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under these rules.

(e) **Testimony Under Oath or Affirmation.** All witnesses shall testify under oath or affirmation administered by the arbitrator (who is designated a Master for this purpose only) or by any duly qualified person.

(f) **Conduct of Hearing.** At the opening of the arbitration hearing, the arbitrator shall make a written record of the place, time, and date of the hearing, and the presence of the parties and counsel. The arbitrator and the parties shall review the written statements concerning issues, witnesses, and exhibits filed with the Private Adjudication Center pursuant to section (b) of this rule. Plaintiff may then present its exhibits (copies only) and witnesses, who may be cross-examined. Defendant may then present its exhibits (copies only) and witnesses, who may be cross-examined. The arbitrator may in his discretion vary this procedure.

(g) **Evidence.** The arbitrator shall weigh all evidence presented to him upon his assessment of its relevance and trustworthiness. The Federal Rules of Evidence shall not apply, except for rules applying to privilege.

(h) **Conclusion of Hearing.** When the parties state that they have no further exhibits or witnesses to offer, the arbitrator shall declare the hearing closed. Counsel may make oral argument, but the filing of posthearing briefs will ordinarily not be permitted. If the arbitrator decides to accept briefs, such briefs must be filed with the Private Adjudication Center and served upon the arbitrator and other parties within 14 days or less, as determined by the arbitrator.

(i) **Sanctions for Failure to Proceed.** For any failure of a party or its counsel to proceed in good faith in accordance with these rules, the Court may impose sanctions pursuant to Local Rule 122.

Rule 608

Filing of Papers With the Private Adjudication Center

Whenever under these rules a party must file papers with the Private Adjudication Center, such filing may be accomplished by mailing the documents by first class mail to The Private Adjudication Center, Inc., Duke University School of Law, Durham, North Carolina, 27706; or by delivering the documents to The Private Adjudication Center, Inc., Room 002, Duke University School of Law, Tower View Road and Science Drive, Durham, North Carolina, 27706; telephone 919/684-2253.

Rule 609

Arbitration Award and Judgment

(a) **Issuance of Award.** The arbitrator shall issue his award within fifteen (15) days of the date of the closing of the hearing or the receipt of posthearing briefs, whichever is later.

(b) **Award Procedure.** The arbitrator shall submit the award and the written record to the clerk, who shall file the same under seal. The award shall dispose of all monetary claims presented to the arbitrator and shall be signed by the arbitrator. The arbitrator is not required to issue an opinion explaining the award. The clerk shall mail a copy of the award to the parties and copies of both the award and the written record to the Private Adjudication Center, such records to be held in confidence by the Center.

(c) **Judgment upon Award.** Unless the parties, within thirty (30) days after the filing of the award, file a stipulation of dismissal or a party files a demand for trial de novo in accordance with Rule 610, the award shall be unsealed and incorporated within a judgment of the court. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect, as a consent judgment of this court in any civil action.

Rule 610

Trial De Novo

(a) **Thirty Day Limit.** Within thirty (30) days after the filing of the sealed arbitration award, any party may file with the court a written demand for trial de novo.

(b) **Return to Court Calendar.** Upon such a demand for a trial de novo, the action shall be placed upon the court's trial calendar. The arbitration award shall remain under seal until final judgment is entered or the case is dismissed.

(c) **Conference With Arbitrator.** Within fifteen (15) days after the filing of a demand for trial de novo, the parties or counsel shall confer with the arbitrator who conducted the arbitration hearing. The arbitrator shall frankly discuss with the parties the strengths and weaknesses of their cases. The parties or counsel shall thereafter, within thirty (30) days after the demand for trial de novo, inform the court by letter whether prospects for settlement appear to be excellent, good, fair, poor, or remote.

(d) **Evidence From the Arbitration Hearing.** At the trial of the action, the court shall not admit evidence that there has been an arbitration proceeding or that an arbitration award has been entered. Recorded testimony given at an arbitration hearing may be used for the same purposes as any deposition under the Federal Rules of Civil Procedure.

(e) **Taxation of Arbitration Expense as a Cost.** If, after trial before the district court, the party who demanded trial de novo does not obtain a judgment which, exclusive of interest and costs, is more favorable than the award of the arbitrator, the clerk shall tax as a cost against such party the fees and expenses paid to the arbitrator. The cost collected by the clerk under this rule shall be paid to the Treasury of the United States.

Rule 611

Evaluation of Arbitration Rules

(a) **Purpose of Evaluation.** These arbitration rules are experimental rules. In order to assess their impact upon the court, the bar, and litigants, it is essential that the rules be evaluated at a reasonably early time so that their performance can be compared with their stated purpose.

(b) **Research Committee.** The Chief Judge shall appoint at least three members of the bar and at least two representatives of the Private Adjudication Center to a Research Committee. The Chief Judge may appoint such other members as he deems advisable. The Chief Judge and the clerk shall serve as ex officio members of the committee.

(c) **Research Techniques.** The Research Committee shall be responsible for developing research tools and techniques in order to evaluate the operation of these rules. For the purpose of creating a control group for statistical comparisons, the clerk may exempt cases, on a random basis, from reference to arbitration. If litigant or counsel surveys are conducted, the Research Committee shall afford the information obtained such confidentiality as it shall deem appropriate. The Research Committee may compile statistical information based upon arbitration awards.

(d) **Report of the Research Committee.** Thirty (30) months after the effective date of these rules, the Research Committee shall file a report with the clerk's office. The report shall be drawn by committee members other than judicial officers and officials of this court. The report shall include an evaluation of the arbitration rules in comparison with their stated purpose and shall make such recommendations as the Research Committee deems appropriate.

(e) **Court Review.** The court shall review the report of the Research Committee and, within six (6) months of the filing thereof, issue a standing order which continues, modifies, or terminates these arbitration rules.

Rules 612-699

[Reserved for future purposes]

APPENDIX OF FORMS

FORM 1

(See Local Rule 204)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
________________ DIVISION

Plaintiff)
)
vs.) Civil Action
) No. __________
Defendant)

INITIAL PRETRIAL STIPULATIONS AND ORDER

In accordance with local Rule 204, M.D.N.C., counsel for each of the parties in the above-entitled action hereby stipulates that:[1]

(1) All parties defendant have been properly served with process.

(2) The court has jurisdiction over the parties and over the subject matter.

(3) All parties plaintiff and defendant have been correctly designated.

(4) No third party complaint or impleading petition is contemplated.

(5) There is no question concerning misjoinder or nonjoinder of parties.

(6) There is no present need to join other parties or to amend the pleadings.

(7) There is no need for, or question concerning the validity of, the appointment of a representative for any party.

(8) There are no pending motions which the parties wish the court to consider.

(9) A trial by jury has (not) been demanded within the time provided by the Federal Rules of Civil Procedure.

(10) There is no need at this time to separate issues for purposes of discovery or trial, and discovery shall proceed on all issues.

(11) There are no related actions pending or contemplated in this or any other court.

(12) To the extent presently known, the parties estimate that a trial of this action will last approximately .... days.

(13) The parties need .... months to complete discovery.[2]

Stipulated and consented to:

______________________	______________________
Counsel for Plaintiff	Counsel for Defendant
Address	Address
Telephone Number	Telephone Number

IT IS ORDERED that all discovery must be completed by the ______ day of ________ 19 ____. IT IS FURTHER ORDERED that any motion for leave to amend pleadings must be filed on or before the ______ day of ________ 19 ___. IT IS FURTHER ORDERED that the scheduled initial pretrial conference is hereby canceled.

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[1] When no stipulation is reached on a particular matter, the parties shall state with specificity their respective positions. For example: (1) All parties defendant have been properly served with process, except defendant X does not so stipulate and claims...

[2] The standard discovery period is 120 days. If the parties propose a longer period, they must set forth their reasons for believing an extended period is required. The discovery period must include time for identification of experts and discovery with respect thereto. In appropriate cases, the parties may wish to provide that experts be identified at the close of a "general" discovery period, with a subsequent 60 day discovery period with respect to experts only.

Notice of any intention to file a dispositive motion, including a motion for summary judgment, shall be filed within twenty (20) days from the close of discovery. See local Rule 206(a). The motion must be filed within sixty (60) days from the close of discovery. See local Rule 206(b).

____
United States District Judge or Magistrate

FORM 2

(See Local Rule 207)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
__ DIVISION

Plaintiff)
)
vs.) Civil Action
) No. ________
Defendant)

ORDER ON FINAL PRETRIAL CONFERENCE

Pursuant to the provisions of Rule 16 of the Federal Rules of Civil Procedure and local Rule 207, a final pretrial conference was held in the above-entitled cause on the ______ day of ________, 19 ___. ________ appeared as counsel for the plaintiff, and ________ appeared as counsel for the defendant.

(1) It is stipulated that all parties are properly before the court and that the court has jurisdiction of the parties and the subject matter, except:

(2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties, except:

(3) It is stipulated that there is no question concerning the validity of the appointment of the representative of any party, except: [Letters or orders of appointment should be included as exhibits.]

(4) In general, the contentions of the plaintiff as to the basis of recovery are as follows:*

---

*In contract cases, the parties should stipulate upon, or state their contentions with respect to, where applicable, (a) whether the contract relied on was oral or in writing; (b) the date thereof and the parties thereto; (c) the substances of the contract, if oral; (d) the terms of the contract which are relied upon, and the portions in controversy; (e) any collateral oral agreement, if claimed, and the terms thereof; (f) any specific breach of contract claimed; (g) any misrepresentation of fact claims; (h) if modification of the contract or waiver of covenant is claimed, what modification or waiver, and how accomplished, and (i) an itemized statement of damages claimed to have resulted from any alleged breach, the source of such information, how computed, and any books or records available to sustain such damage claimed.

In negligence cases, the parties should stipulate upon, or state their contentions with respect to, where applicable, (a) the owner, type and make of each vehicle involved; (b) the agency of each driver; (c) the place and time of accident, conditions of weather, and whether daylight or dark; (d) nature of terrain as to level, uphill or downhill; (e) traffic signs, signals, and controls, if any, and by what authority placed; (f) any claimed obstruction of view; (g) presence of other vehicles, where significant; (h) a detailed list of acts of negligence or contributory negligence claimed; (i) specific statutes, ordinances, rules, or regulations alleged to have been violated, and upon which each of the parties will rely at the trial to establish negligence or contributory negligence; (j) a detailed

(5) In general, the contentions of the defendant as to the basis of its defenses and counterclaims are as follows:*

(6) Any third party defendant or cross-claimant should follow the same procedure as set out in paragraphs (4) and (5) for plaintiff and defendant.*

(7) In addition to the other stipulations contained herein, the parties hereto stipulate to the following undisputed material facts:

(a)
(b)

(8) The following is a list of the exhibits, with pretrial identification markings and a brief description of each exhibit, which plaintiff may offer at the trial:

(a)
(b)

(9) It is stipulated that opposing counsel has been furnished a copy of, inspected, or waives inspection of, each exhibit identified by the plaintiff, except:

(10) It is stipulated that each of the exhibits identified by the plaintiff is authentic and admissible and, if relevant and material, may be received in evidence without further identification or proof, except: [Set out with particularity the basis of objection to specific exhibits.]

(11) The following is a list of the exhibits, with pretrial identification markings and a brief description of each exhibit, which the defendant may offer at the trial:

(12) It is stipulated that opposing counsel has been furnished a copy of, inspected, or waives inspection of each exhibit identified by the defendant, except:

(13) It is stipulated that each of the exhibits identified by the defendant is authentic and admissible and, if relevant and material, may be received in evidence without further identification or proof, except: [Set out with particularity the basis of objection to specific exhibits.]

(14) Any third-party defendant and cross-claimant should follow the same procedure with respect to exhibits as above outlined for plaintiff and defendant.

(15) The following is a list of the names and addresses of the witnesses plaintiff may offer at the trial, together with a brief statement of the material points that counsel proposes to establish by the testimony of each witness:

(a)
(b)

(16) The following is a list of the names and addresses of the witnesses defendant may offer at the trial, together with a brief statement of the material points that counsel proposes to establish by the testimony of each witness:

(a)
(b)

---

list of nonpermanent personal injuries claimed, including the nature and extent thereof; (k) a detailed list of permanent personal injuries claimed, including the nature and extent thereof; (l) the age of any party alleged to have been injured; (m) the life and work expectancy of any party seeking to recover for permanent injury; (n) an itemized statement of all special damages, such as medical, hospital, nursing, etc., with the amount and to whom paid; (o) if loss of earnings is claimed, the amount, manner of computation and period for which loss is claimed; (p) a detailed list of any property damages, and (q) in death cases, the decedent's date of birth, marital status, employment for five years before date of death, work expectancy, reasonable probability of promotion, rate of earnings for five years before date of death, life expectancy under mortuary tables, and general physical condition immediately prior to date of death.

In the event this case does not fall within any of the categories enumerated above, or any of the categories suggested by this form, counsel shall nevertheless set forth their positions in detail.

(17) Any third-party defendant and cross-claimant should follow the same procedure with respect to witnesses as above outlined for plaintiff and defendant.

(18) There are no pending or impending motions, and neither party desires further amendments to the pleadings, except:

(19) Additional consideration has been given to a separation of the triable issues, and counsel for all parties are of the opinion that a separation of issues in this particular case would (would not) be appropriate.

(20) The plaintiff contends that the contested issues are as follows:

(21) The defendant contends that the contested issues are as follows:

(22) Any third-party defendant and cross-claimant contends that the contested issues are as follows:

(23) Counsel for the parties announce that all witnesses are available, and the case is in all respects ready for trial. The probable length of the trial is estimated to be ________ days.

(24) Counsel for the parties represent to the court that, in advance of the preparation of this order, there was a full and frank discussion of settlement possibilities and that prospects for settlement appear to be (excellent) (good) (fair) (poor) (remote). Counsel for the plaintiff will immediately notify the clerk in the event of material change in settlement prospects.

____
Counsel for Plaintiff
Address
Telephone

____
Counsel for Defendant
Address
Telephone

APPROVED AND ORDERED FILED:
Date ______________________________

____
United States District Judge or Magistrate

At the conclusion of the final pretrial conference, the court will dictate a memorandum announcing requirements with respect to the filing of trial briefs, the filing of requests for jury instructions or proposed findings of fact and conclusions of law, the manner of marking exhibits, and the number of copies of exhibits to be furnished at trial. The court will also set an actual or tentative trial date.

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RULES OF THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

As Amended to May 18, 1984.

Index follows these rules.

ORDERS PROMULGATED BY THE BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN THE MATTER OF:)
)
)
RULES OF PRACTICE AND) ORDER
PROCEDURE FOR THIS COURT)

It appearing that the United States Supreme Court has promulgated new Bankruptcy Rules, and the United States Congress not having objected thereto, thereby causing the 1983 Federal Rules of Bankruptcy Procedure to be effective and binding upon all federal Bankruptcy Courts beginning August 1, 1983,

IT IS ORDERED that all local rules promulgated by this Court prior to August 1, 1983 be and hereby are RESCINDED.

At Greensboro, in said District, this the 5th day of August, 1983.

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN THE MATTER OF:)
)
)
RULES OF PRACTICE AND) ORDER
PROCEDURE FOR THIS COURT)

Pursuant to the authority of 28 U.S.C. 2701, the Federal Rules of Civil Procedure, the Bankruptcy Code and the Bankruptcy Rules, and for good cause appearing therefore, IT IS ORDERED THAT

The 1983 Federal Rules of Bankruptcy Procedure be and hereby are supplemented as follows:

1. The following language is added to Rule 4003(a):

> "Except in unusual circumstances, the Debtor in a Chapter 7 case should file a claim for exempt property pursuant to Section 522(b) (1) of the Bankruptcy Code, if at all, on Form 91-C, which is available in the Clerks Office of this Court; the Debtor's filing of Form 91-C must be referenced in Schedule B-4 of the Debtor's schedules."

2. The following language is inserted between the first and second sentences of Rule 4003(b):

> "The Court may grant any party in interest an extension of time for objecting to the Debtor's claim of exempt property only upon that party's application setting forth reasons for the extension request, such notice as the Court deems appropriate under the circumstances, and order of the Court."

At Greensboro, in said District, this the 5th day of August, 1983.

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN THE MATTER OF:)
)
)
RULES OF PRACTICE AND) ORDER
PROCEDURE FOR THIS COURT)

Pursuant to the authority of 28 U.S.C. 2701, the Federal Rules of Civil Procedure, the Bankruptcy Code and the Bankruptcy Rules, and for good cause appearing therefore, and

It appearing that Bankruptcy Rule 3003(c) (2) requires any creditor whose claim is listed in a Chapter 11 case as disputed, contingent, or unliquidated as to amount, to file a proof of claim in order to be treated as a creditor for purposes of voting and distribution; and

It also appearing that an order is entered upon the filing of a Chapter 11 petition which requires each creditor whose claim is listed as disputed, contingent, or unliquidated to file a proof of claim within ninety (90) days or be barred from voting or participation in the case; and

It also appearing that a significant burden is placed upon creditors to determine whether their claims are listed as disputed, contingent, or unliquidated, and that knowledge of such fact is necessary to enable each creditor so listed to advance its claim in a Chapter 11 case; therefore,

IT IS ORDERED as a local rule of this Court, that from this time forward, the debtor shall notify each creditor whose claim is listed on the petition as contingent, disputed, or unliquidated of that fact within fifteen (15) days after filing the schedule of assets and liabilities or within fifteen (15) days after addition of such creditors to the petition.

IT IS FURTHER ORDERED that failure to notify a creditor that its claim is listed as disputed, contingent, or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent, or unliquidated, as though a proof of claim had been filed by the creditor.

At Greensboro, in said District, this the 5th day of August, 1983.

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Part I. Commencement of Case; Proceedings Relating to Petition and Order for Relief

Rule No. LBR-1007

Mailing Matrix Required

As a requirement of filing, all Chapter 7 and 11 bankruptcy petitions must be accompanied by an alphabetized matrix containing the names and addresses of all parties-in-interest, including the debtor, debtor's attorney, creditors and appropriate governmental agencies. The matrix shall be prepared according to the forms and instructions provided upon request by the Clerk's Office.

Rule No. LBR-1009

Certificate of Service Required for Amendment to Petitions, Schedules or Statements

Any amendment to a petition, list, schedule or statement shall be accompanied by a certificate of service in the form of a statement of the date and manner of service and of the names and addresses of the persons served, certified by the person who made the service.

Part II. Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants

Rule No. LBR-2002

General Notice Period

The period of notice of hearing or objection required in the Bankruptcy Rules shall be ten (10) days, unless Bankruptcy Rule 2002, other Bankruptcy Rule, or the Court otherwise provides.

Rule No. LBR-2003

Retention of Creditors Meeting Tapes for Six Months

The Clerk shall retain and preserve the taped recordings of the meetings of creditors required by § 341 of the Bankruptcy Code for a period of six (6) months from the date first set for said meeting. After the expiration of six (6) months from said date, the Clerk is authorized to erase or otherwise destroy the aforementioned taped recordings, unless otherwise ordered by the Court.

Rule No. LBR-2015

Search Fee Charged by Chapter 13 Trustee

The Standing Chapter 13 Trustees are authorized to charge a two dollar ($2) search fee when answering inquiries which require a search of the records for each case with respect to which the inquiry is made, to use as a part of their operating expenses. Said Trustees shall account to the Court for such funds so collected.

Rule No. LBR-2016

Period for Filing Attorney Compensation Disclosure Statement

The disclosure of attorney compensation required by § 329 of the Bankruptcy Code must be filed with the Court within fifteen (15) days of the date the original petition is filed.

Part III. Claims and Distribution to Creditors and Equity Interest Holders; Plans

Rule No. LBR-3003

Chapter 11 Claims

(a) Period for Filing Chapter 11 Claims.

In a Chapter 11 case, a proof of claim (if required to be filed) shall be filed within ninety (90) days after the date first set for the meeting of creditors called pursuant to § 341(a) of the Bankruptcy Code, except as otherwise specified by order of this Court.

(b) Debtor Notification of Chapter 11 Creditor of Disputed, Contingent or Unliquidated Claim.

In Chapter 11 cases, the debtor shall notify each creditor whose claim is listed on the debt schedules as contingent, disputed, or unliquidated of that fact within fifteen (15) days after filing the Schedule of Assets and Liabilities or within fifteen (15) days after addition of such creditor to the petition. Within three (3) days after service has been made, the debtor shall mail a certificate of service to the Clerk's Office. Failure to notify a creditor that his claim is listed as disputed, contingent, or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent or unliquidated, as though a proof of claim had been filed by the creditor.

Rule No. LBR-3010

Payments to Chapter 13 Creditors

Bankruptcy Rule 3010(b) is amended to the extent that Standing Chapter 13 Trustees are authorized to make payments to creditors in amounts smaller than $15 without waiting until that creditor's dividends accumulate to $15. The decision as to whether to make smaller payments shall be made in each case by the Trustee and such decision shall be solely the Trustee's discretion as to the best administration of the individual estate.

Rule No. LBR-3012

Trustee Valuation of Creditor's Security

After notice, a Chapter 13 Trustee may determine the value of a creditor's security at the § 341 creditors meeting, and unless an objection is filed within ten (10) days after notice of such valuation, the Court may accept the valuation for the purpose of distribution under the Plan.

Part IV. The Debtor: Duties and Benefits

Rule No. LBR-4001

Special Relief From Stay Provisions

(a) Lifting of Stay Upon Abandonment.

In Chapter 7, 11, and 13 cases, the abandonment of property pursuant to § 554 of the Bankruptcy Code shall have the effect of lifting the automatic stay (of § 362(a) of the Bankruptcy Code) with respect to the property abandoned.

(b) Secured Creditor Contact with Chapter 13 Debtor.

In Chapter 13 cases, affected secured creditors may:

1. Inquire of the debtor about the status of insurance coverage on property used as collateral;
2. If paid directly to the creditor, contact the debtor to inquire about such payments.

(c) Taxing Authority Actions Authorized.

In Chapter 7 and 13 cases, the Internal Revenue Service and the North Carolina Department of Revenue are authorized:

1. To assess tax liability shown on voluntarily filed returns and other agree-to-tax liabilities;
2. To offset against any refund due a debtor in a Chapter 7 or 13 case, any tax due the United States government;
3. To assess any tax liability satisfied by offsetting any refund, when such liability has not been assessed previously; and
4. To make income tax refunds, in the ordinary course of business, directly to the debtor unless otherwise directed by the Court or otherwise instructed by the Chapter 7 or Chapter 13 Trustee.

In Chapter 13 cases only, upon the filing of a proof of claim with the Standing Trustee's office by the Internal Revenue Service or State, County or City Departments of Revenue, said claim shall be recognized as a priority claim to be paid in said Chapter 13 case unless objected to or otherwise directed by the Court in a specific case.

(d) Notice of Request to Recover Attorneys' Fees.

In all bankruptcy cases, the automatic stay provided for by § 362 of the Bankruptcy Code is modified to permit counsel requesting recovery of attorneys' fees pursuant to § 506(b) of the Bankruptcy Code to give the "five-day notice" required by North Carolina General Statutes § 6-21.2(5) or such similar notice as may be required by other states.

Rule No. LBR-4003

Local Exempt Property Claim Form Required

Except in unusual circumstances, each debtor who is an individual in a Chapter 7 case shall file a claim for exempt property pursuant to § 522(b)(1) of the Bankruptcy Code, if at all, on Local Form #91-C, which form is available from the Clerk of this court; the debtor's filing of Local Form #91-C must be referenced in Schedule B-4 of the debtor's schedules.

Part V. Bankruptcy Courts and Clerks

Rule No. LBR-5005

Routing of Documents Through Clerk's Office

All pleadings (including but not limited to complaints, answers, motions and applications), and all prepared orders, shall be tendered by the party submitting such document to the Clerk's Office, rather than directly to the Judge, and the Clerk's Office shall first accomplish any necessary processing of such document, before such document is forwarded to any Judge of this Court for consideration.

Part VII. Adversary Proceedings

Rule No. LBR-7003

Adversary Proceeding Cover Sheet Required

All complaints initiating adversary proceedings in Chapter 7, 11 and 13 bankruptcy cases shall be accompanied by a fully completed Bankruptcy Cover Sheet (Form BC-104), containing the complete information as listed therein.

Rule No. LBR-7067

Registry Accounts

In the event that a depository intended by the Court to receive registry funds is not, immediately upon the Court's receipt of the registry funds, able to pledge sufficient collateral for receipt of those funds, such funds may be retained temporarily in non-interest-bearing U. S. Treasury accounts as necessary to arrange for their deposit in interest-bearing accounts.

Part IX. General Provisions

Rule No. LBR-9007

General Notice Provisions

(a) Designation of Parties to Provide Notice.

The Clerk of this Court is authorized to designate the parties who shall provide such notice to creditors and parties-in-interest as required under the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules of Court.

(b) Service Required on Trustee and Attorney for Debtor-In-Possession.

Any and all filings (except claims) in all proceedings and cases under the Bankruptcy Code must be served on the Trustee (including the Standing Chapter 13 Trustee) whether or not such Trustee is a party to the proceeding. In Chapter 11 cases, the attorney for the debtor-in-possession is to be served in like manner in all proceedings.

Rule No. LBR-9010

Attorney Representation in the Bankruptcy Court

(a) Persons Who May Practice Before the Bankruptcy Court.

Only those persons who are admitted to practice before the United States District Court for this District will be allowed to practice before this Court, although licensed attorneys may be permitted by the Court to appear on an ad hoc basis.

(b) Attorney Representation of Debtor.

Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the responsible attorney of record for all purposes including the representation of the debtor in all matters that arise in conjunction with the proceeding until the case is closed or the attorney is relieved from representation upon application and court order.

Form 91-C

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

In the Matter of:) Case No. ____________________
)
) DEBTOR'S CLAIM FOR
) PROPERTY EXEMPTIONS
)
)
Debtor.)

I, ______________________________, the undersigned debtor, hereby claim the following property as exempt pursuant to Chapter 1C, Article 16, § 1C-1601 et seq. of the North Carolina General Statutes.

1. REAL OR PERSONAL PROPERTY USED BY DEBTOR OR DEBTOR'S DEPENDENT AS RESIDENCE OR BURIAL PLOT. (Total net value not to exceed $7,500. Amount of the unused portion of first $2,500 may be carried forward to be applied on other property claimed as exempt.)

Description of Property & Address	Market Value	Mtg. Holder or Lien Holder	Amt. Mtg. or Lien	Net Value

(a) Total Net Value $__________
Total Net Exemption $__________
(b) Unused portion of first $2,500. (This amount, if any, may be used to claim an exemption in any property owned by the debtor.) $__________

2. MOTOR VEHICLE. (Only one vehicle allowed under this paragraph with net value claimed as exempt not to exceed $1,000 plus any portion desired for use from paragraph 1 (b) above.)

Model, Year Style of Auto	Market Value	Lien Holder	Amt. Lien	Net Value

(a) Statutory allowance $1,000
(b) Amount from 1 (b) above to be used in this paragraph. (A part or all of 1 (b) may be used as needed.) $__________
Total Net Exemption $__________

3. TOOLS OF TRADE OR PROFESSIONAL BOOKS. (Used by Debtor or Debtor's dependent. Total net value of all items claimed as exempt not to exceed $500.00.)

Description	Market Value	Lien Holder	Amt. Lien	Net Value

(a) Statutory allowance $ 500
(b) Amount from 1 (b) above to be used in this paragraph. (A part or all of 1 (b) may be used as needed.) $__________
Total Net Exemption $__________

4. PERSONAL PROPERTY USED FOR HOUSEHOLD OR PERSONAL PURPOSES NEEDED BY DEBTOR OR DEBTOR'S DEPENDENTS. (Debtor's total net value not to exceed $2,500 plus $500 for each dependent, but not to exceed $2,000 total for all dependents.)

Description of Property	Market Value	Lien Holder	Amt. Lien	Net Value
Clothing & Personal				
Kitchen Appliances				
Stove				
Refrigerator				
Freezer				
Washing Machine				
Dryer				
China				
Silver				
Jewelry				
Living Room Furniture				
Den Furniture				
Bedroom Furniture				
Dining Room Furniture				
Lawn Furniture				
Television				
( ) Stereo ( ) Radio				
Musical Instruments				
( ) Piano ( ) Organ				
Air Conditioner/Dehumid.				
Paintings & Art				
Lawn Mower				
Yard Tools				
Crops				
Animals				
Recreational Equipment				
			Total Net Value	

(a) Statutory allowance for debtor $2,500

(b) Statutory allowance for debtor's dependents: __________ dependents at $500 each (not to exceed $2,000 for total dependents) __________

(c) Amount from 1 (b) above to be used in this paragraph. (A part or all of 1 (b) may be used as needed.) __________

Total Net Exemption __________

5. LIFE INSURANCE. (As provided in Article X, Section 5 of North Carolina Constitution.)

Name of Insurance Company ______________________________ Policy No. ________

Name of Insured ______________________________ Policy Date ________

Name of Beneficiary ______________________________

6. PROFESSIONALLY PRESCRIBED HEALTH AIDS (FOR DEBTOR OR DEBTOR'S DEPENDENTS). (No limit on value or number of items.)

Description: ______________________________

7. DEBTOR'S RIGHT TO RECEIVE FOLLOWING COMPENSATION: (No limit on number or amount.)

   A. $ ______________ Compensation for personal injury to debtor or to person on whom debtor was dependent for support.

   B. $ ______________ Compensation for death of person on whom debtor was dependent for support.

8. ANY OTHER REAL OR PERSONAL PROPERTY WHICH DEBTOR DESIRES TO CLAIM AS EXEMPT THAT HAS NOT PREVIOUSLY BEEN CLAIMED ABOVE. (THE AMOUNT CLAIMED MAY NOT EXCEED THE REMAINING AMOUNT AVAILABLE UNDER PARAGRAPH 1 (b) WHICH HAS NOT BEEN USED FOR OTHER EXEMPTIONS.)

Description	Market Value	Lien Holder	Amt. Lien	Net Value

(a) Total Net Value of property claimed in paragraph 8. $ ______
(b) Total amount available from paragraph 1 (b). $ ______
(c) Less amount available under paragraph 1 (b) which was used in other paragraphs:
Paragraph 2 (b) $ ______
Paragraph 3 (b) $ ______
Paragraph 4 (c) $ ______
Net Balance Available from paragraph 1 (b) $ ______
Total Net Exemption $ ______

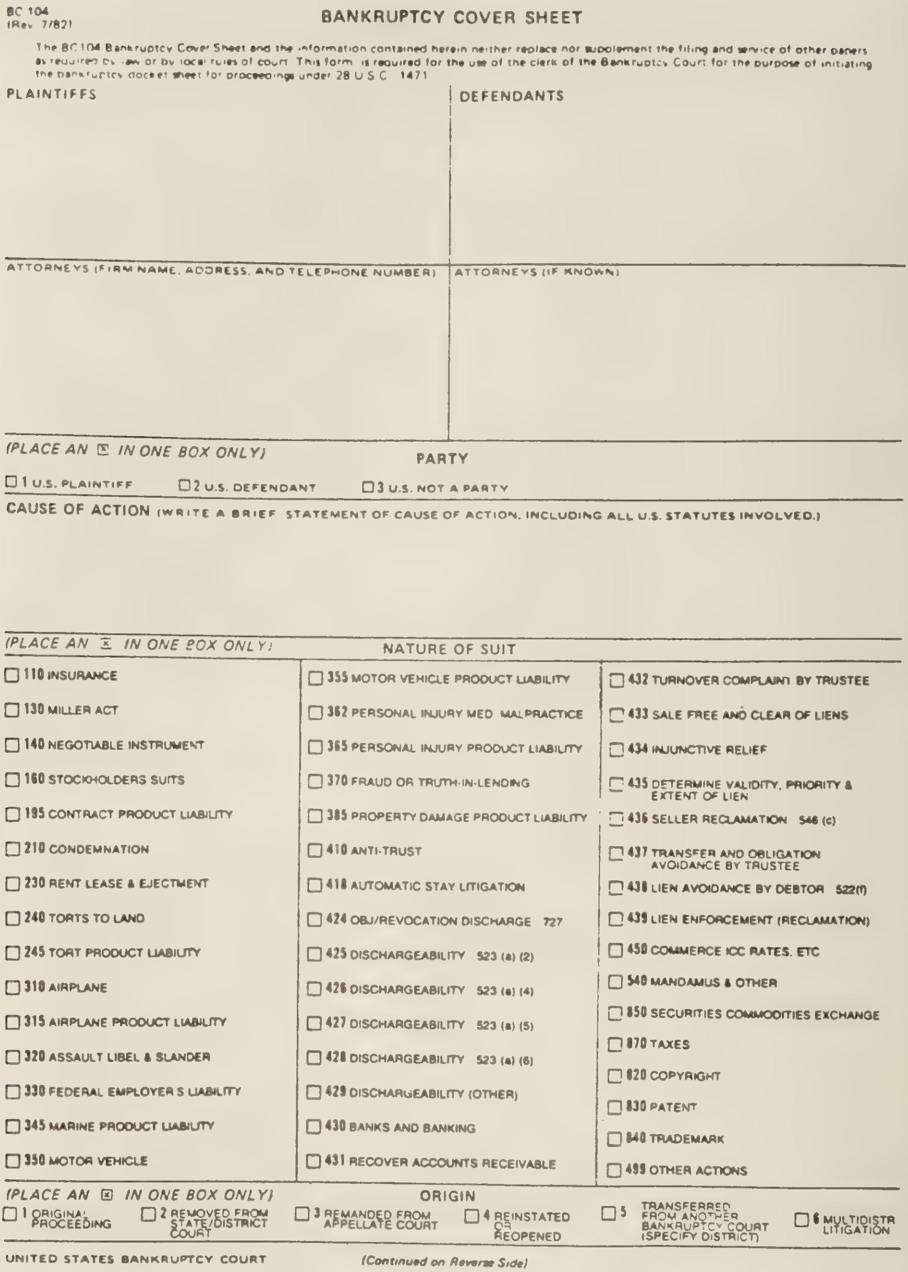
9. THE FOLLOWING TANGIBLE PERSONAL PROPERTY WAS PURCHASED BY THE DEBTOR WITHIN 90 DAYS OF THE FILING OF THE BANKRUPTCY PETITION:

Description	Market Value	Lien Holder	Amt. Lien	Net Value

None of the property listed in paragraph 9 has been included in this Request for Exempt Property. (Tangible personal property purchased within 90 days of the filing of the petition cannot be exempted.)

DATE: ______________________

____
Debtor



BC 104
(Rev. 7/82)

BANKRUPTCY COVER SHEET

The BC 104 Bankruptcy Cover Sheet and the information contained herein neither replace nor supplement the filing and service of other papers as required by law or by local rules of court. This form is required for the use of the clerk of the Bankruptcy Court for the purpose of initiating the bankruptcy docket sheet for proceedings under 28 U.S.C. 1471

PLAINTIFFS	DEFENDANTS
ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)	ATTORNEYS (IF KNOWN)

(PLACE AN ☒ IN ONE BOX ONLY) PARTY

☐ 1 U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☐ 3 U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED.)

(PLACE AN ☒ IN ONE BOX ONLY) NATURE OF SUIT

☐ 110 INSURANCE
☐ 130 MILLER ACT
☐ 140 NEGOTIABLE INSTRUMENT
☐ 160 STOCKHOLDERS SUITS
☐ 195 CONTRACT PRODUCT LIABILITY
☐ 210 CONDEMNATION
☐ 230 RENT LEASE & EJECTMENT
☐ 240 TORTS TO LAND
☐ 245 TORT PRODUCT LIABILITY
☐ 310 AIRPLANE
☐ 315 AIRPLANE PRODUCT LIABILITY
☐ 320 ASSAULT LIBEL & SLANDER
☐ 330 FEDERAL EMPLOYER S LIABILITY
☐ 345 MARINE PRODUCT LIABILITY
☐ 350 MOTOR VEHICLE
☐ 355 MOTOR VEHICLE PRODUCT LIABILITY
☐ 362 PERSONAL INJURY MED MALPRACTICE
☐ 365 PERSONAL INJURY PRODUCT LIABILITY
☐ 370 FRAUD OR TRUTH-IN-LENDING
☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY
☐ 410 ANTI-TRUST
☐ 418 AUTOMATIC STAY LITIGATION
☐ 424 OBJ/REVOCATION DISCHARGE 727
☐ 425 DISCHARGEABILITY 523 (a) (2)
☐ 426 DISCHARGEABILITY 523 (a) (4)
☐ 427 DISCHARGEABILITY 523 (a) (5)
☐ 428 DISCHARGEABILITY 523 (a) (6)
☐ 429 DISCHARGEABILITY (OTHER)
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☐ 435 DETERMINE VALIDITY, PRIORITY & EXTENT OF LIEN
☐ 436 SELLER RECLAMATION 546 (c)
☐ 437 TRANSFER AND OBLIGATION AVOIDANCE BY TRUSTEE
☐ 438 LIEN AVOIDANCE BY DEBTOR 522(f)
☐ 439 LIEN ENFORCEMENT (RECLAMATION)
☐ 450 COMMERCE ICC RATES, ETC
☐ 540 MANDAMUS & OTHER
☐ 850 SECURITIES COMMODITIES EXCHANGE
☐ 870 TAXES
☐ 820 COPYRIGHT
☐ 830 PATENT
☐ 840 TRADEMARK
☐ 499 OTHER ACTIONS

(PLACE AN ☒ IN ONE BOX ONLY) ORIGIN

☐ 1 ORIGINAL PROCEEDING ☐ 2 REMOVED FROM STATE/DISTRICT COURT ☐ 3 REMANDED FROM APPELLATE COURT ☐ 4 REINSTATED OR REOPENED ☐ 5 TRANSFERRED FROM ANOTHER BANKRUPTCY COURT (SPECIFY DISTRICT) ☐ 6 MULTIDISTR LITIGATION

UNITED STATES BANKRUPTCY COURT

(Continued on Reverse Side)

BC 104
(Rev. 7/82)

BANKRUPTCY COVER SHEET (Reverse Side)

REMARKS

Check/Fill in if demanded in complaint:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND $	OTHER

RELATED PROCEEDING(S), IF ANY, PENDING

JUDGE ____________ BANKRUPTCY DOCKET NUMBER ____________

PROCEEDINGS RISING OUT OF BANKRUPTCY CASES ARE DEEMED RELATED IF PROCEEDINGS INVOLVE

☐ 1. SAME PROPERTY

☐ 2. SAME ISSUE OF FACT OR SAME TRANSACTION

☐ 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT COPYRIGHT OR TRADEMARK

Check YES only if demanded in complaint.
JURY DEMAND: ☐ YES ☐ NO

DATE

SIGNATURE OF ATTORNEY OF RECORD

INSTRUCTIONS

Form BC 104, Bankruptcy Cover Sheet, and the information contained therein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the clerk of the bankruptcy court in initiating the bankruptcy docket sheet for adversary proceedings under 28 U.S.C. Section 1471, and to facilitate the gathering of statistical information. Accordingly, a bankruptcy proceeding cover sheet is to be submitted to the clerk of the bankruptcy court for each complaint filed. The form is largely self explanatory. Two areas needing possible explanation are the CAUSE OF ACTION and NATURE OF SUIT portions of the form.

Under *Cause of Action* give a brief narrative description of the cause of action including all Federal statutes involved. For example, "Complaint seeking damages for failure to disclose information, Consumer Credit Protection Act, 15 U.S.C. 1601 et. seq.".

Under *Nature of Suit* place an "X" in the appropriate box. Only one box should be checked. If the cause fits more than one nature of suit, select the most definitive. This list is not all-inclusive. If the action does not fall within one of the specifically listed categories, you should check #499, other actions, [e.g., a tort action other than one specifically listed or an action pursuant to E.R.I.S.A.]

Because there are several categories involving liens, the following additional information should be used as a guide in making the proper selection.

#437 Transfer and Obligation Avoidance By Trustee — Complaint by a trustee to avoid a transfer, lien or obligation pursuant to any of a trustee's powers to do so.

#433 Sale Free and Clear of Lien — Complaint to sell property free and clear of any interest in such property.

#439 Lien Enforcement (Reclamation) — Complaint by a party who has a lien against property of the estate seeking to 1) terminate or modify the automatic stay, 2) obtain possession, and 3) foreclose all other interests in the property. If a secured party seeks only to lift the stay with respect to such property, then #418 automatic stay litigation should be checked.

#435 Determine Validity, Priority or Extent of Lien — Complaint asking court to make a determination involving a question of a lien's validity, priority or amount.

#438 Lien Avoidance By Debtor §522 — Complaint by debtor to avoid a lien to the extent it impairs an exemption.

If this adversary proceeding is related to any other pending adversary proceeding, enter the six digit adversary proceeding docket number in the space indicated. ALSO indicate in the "Remarks" portion of the form the name of the debtor in, and the name of the docket number of, the bankruptcy *case* out of which the proceeding arose, and identify the district where the bankruptcy case is pending or was pending when closed, if different from the district in which this proceeding is being filed.

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RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

As Amended to July 15, 1983.

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II. Bankruptcy Rules

Local Rule Referencing All Bankruptcy Matters to the Bankruptcy Judge and Providing for Bankruptcy Court Clerk.

APPENDIX OF FORMS

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I. General Rules

Rule 1. Attorneys.

A. Eligibility and Admission. Any lawyer who is a member in good standing of the North Carolina State Bar is eligible for admission to the bar of this court, which admission shall be granted as a matter of course upon the payment of a fee in the amount of $2.00 (Two Dollars) and upon taking the prescribed oath in open court which reads as follows:

> I do solemnly swear that I am a member in good standing of the North Carolina State Bar entitled to practice law in the courts of general jurisdiction of the State of North Carolina, and I do further solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same and that I will demean myself as an attorney and officer of this court

in accordance with the Canons of Ethics of the North Carolina State Bar and American Bar Association, and according to law.

I take this obligation freely without any mental reservation or purpose of evasion, so help me God.

Any lawyer who is a member in good standing in the United States District Court for the Middle and Eastern Districts of North Carolina may practice in this District without the necessity of taking the oath or paying the $2.00 fee, and upon his appearance in this District shall be deemed a member of this District Bar.

It shall not be necessary for a member in good standing of the North Carolina State Bar to be formally admitted in this district in advance of making an appearance and filing papers; such attorney may be admitted *nunc pro tunc* at trial time.

B. Special Admissions. Any lawyer who is a member in good standing of the Bar of the Supreme Court of the United States or the Bar of the Supreme Court of any state in the United States may, in the discretion of the judges of this court, be permitted to appear in a particular case. If such permission is granted, and if a member of the bar of this court is not associated, said attorney and his client shall be deemed to have consented that service of all pleadings and notices may be made upon a deputy clerk in the appropriate division of this court as process agent. The court encourages such out-of-state attorneys to associate a member of the bar of this court in *all* cases, but will not require such association where the amount in controversy or the importance of the case does not appear to justify double employment of counsel. Special admissions will be the exception and not the rule, and no out-of-state lawyer will be permitted to practice frequently or regularly in this court without association of local counsel.

Where justice requires, the authorized deputy clerks at Asheville, Statesville and Charlotte may permit the filing of papers at the request of out-of-state counsel; provided, however, the further participation of out-of-state counsel shall be governed as hereinabove provided.

C. Withdrawal of Counsel. If it will not delay a scheduled hearing or trial, counsel may file written consent of their client to their withdrawal and at the same time cause to be filed an appearance by other counsel, and such substitution of counsel shall be effective without court approval. Except for such substitution of counsel, there shall be no effective withdrawal except on order signed by one of the judges of the court.

D. Presenting Judgments, Orders, and Communications to Judges. Judgments and orders submitted by counsel will ordinarily be sent to the clerk in the appropriate division and not to the judge, unless shortness of time or other good reason appears for sending them directly to the judge. Copies as may be needed will be certified by the clerk.

All communications (letters, briefs, enclosures, etc.) sent to a judge about a case must show a copy sent to opposing counsel, and copies must be sent to opposing counsel.

E. Filing of Papers. All orders and judgments shall be filed with the court in duplicate. All papers of every sort may be filed at Statesville, Charlotte, or Asheville, regardless of the Division in which the case may be pending as may suit the convenience of counsel.

Rule 2. Sessions.

The court shall be in continuous session in all divisions of the district, and all matters, criminal and civil, shall be subject to being called for hearing and trial at any time upon reasonable notice to the parties.

Regular terms for the disposition of criminal cases shall be as follows:

ASHEVILLE DIVISION:
First Monday, January, March, May, July, September, November
BRYSON CITY DIVISION:
Third Monday, January, March, May, July, September, November
CHARLOTTE DIVISION:
First Monday, February, April, June, August, October, December
SHELBY DIVISION:
(Rutherfordton)
First Monday, February, April, June, August, October, December
STATESVILLE DIVISION:
Third Monday, February, April, June, August, October, December

(When the first day of any scheduled term falls on a legal holiday, court will convene the following day.)

Additional criminal sessions will be scheduled from time to time in all divisions as may be required to dispose of the criminal dockets promptly.

Trial calendars in civil cases will be prepared by the court, usually at the time of the Motion, Pre-trial and Settlement conference, or soon thereafter. Civil sessions of court will be held as often as necessary to accomplish, insofar as possible and except in the unusual cases, the following *illustrative* schedule of disposition of cases.

(a) In the unusual case where *both* sides press for trial and *both* counsel are diligent in preparation — not more, and usually less, than six months should elapse between filing of complaint and trial.

(b) When *one* side presses for an early trial, the time lapse from filing complaint to trial should not exceed nine months.

(c) Where neither side presses for an early trial, the time lapse from filing complaint to trial should not exceed fifteen months.

(d) If any case becomes two years old — regardless of its difficulty — it will be treated as a judicial emergency, unless, for good cause, an order is entered putting the case on the inactive docket.

If necessary to promote the efficient administration of justice, all hearings and trials of civil cases may be transferred from any division to any other division within the district. With the consent of the parties, the judges may conduct hearings and trials at any place within the district. (Amended August 12, 1971; March 12, 1973; October 31, 1975; January 1, 1982.)

Rule 3. Filing Fee, Cost Bond, Security, Recognizance, and Prohibited Sureties.

A. Filing Fee and Cost Bond. In every civil action commenced in or removed to this court there shall be filed at the time of commencing or removal a $15.00 filing fee. In a civil case commenced in this court, no bond, or cash deposit in lieu of such bond, as security for costs shall be required except on motion. However in a removal case, a $200.00 bond, or cash deposit in lieu of such bond, as security for costs shall be filed as required by Title 28 United States Code 1446(d).

B. Security. In both civil and criminal actions, bonds shall be allowed and taken with security, or one or more sureties, as provided by the federal statutes, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure. The judges of this district may, for good cause, enter orders restricting any bonding company or surety company from being accepted as surety upon any bond in any case or matter in this district.

C. Recognizance. In criminal cases, release on personal recognizance shall be freely granted by United States Commissioners. The requirement of security will ordinarily be imposed only in the unusual and more serious cases.

D. Prohibited Sureties. Members of the Bar, administrative officers or employees of this court, the United States Marshal, his deputies or assistants, shall not act as a surety in any suit, action or proceeding pending in this court.

Rule 4. Jurors.

Ordinarily, in the interest of time, the court will conduct the examination of prospective jurors, but may permit counsel to do so. If the court conducts the examination, counsel may suggest additional questions.

When jurors for a term of court are drawn, members of the bar of this court, upon request, shall be furnished with a copy of the list. The list shall include the address of each juror. However, no juror shall be contacted, either directly or through any member of his immediate family, in an effort to secure information concerning his background.

When the jurors report for duty at a term of court, the clerk shall make available to members of the bar of this court a diagram which shows the name, address and occupation of each juror, and the seat assigned him in the box.

Rule 5. No Photographing, Televising, or Broadcasting of Court Proceedings.

The taking of photographs in the courtroom, or in the corridors immediately adjacent thereto, during the progress of judicial proceedings, or during any recess, and the transmitting or sound recording of such proceedings for broadcasting by radio or television, shall not be permitted. Proceedings other than judicial proceedings, designed and conducted as ceremonies, such as administering oaths of office to appointed officials of the court, presentation of portraits, and similar ceremonial occasions, may be photographed in or broadcast or televised from the courtroom, with the permission and under the supervision of the court.

Rule 6. Orders and Judgments Grantable by Clerk.

Pursuant to the provisions of Rule 77(c), Federal Rules of Civil Procedure, the Clerk of the court at Asheville and an authorized deputy clerk at Asheville, Charlotte, and Statesville are authorized to grant and enter the following orders and judgments without further direction by the court, but his action may be suspended, altered or rescinded by the court for cause:

(1) Consent orders for the substitution of attorneys.

(2) Consent orders extending for not more than 30 days the time within which to answer or otherwise plead, answer interrogatories submitted under

Rule 33, Federal Rules of Civil Procedure, or requests for admission as provided for in Rule 36, Federal Rules of Civil Procedure. Care will be taken not to extend the time for so long as to delay unreasonably the trial. Matters in bankruptcy and those matters set forth in Rule 6(b), Federal Rules of Civil Procedure, are not included in this authorization.

Where convenience and necessity are thought to require it; *e.g.*, unavailability of a judge, and except where an extension may delay a scheduled trial or hearing, the Clerk or deputy clerk(s) in the division in which the proceeding is pending is/are authorized to extend for not more than ten days the time within which to answer or otherwise plead, answer interrogatories submitted under Rule 33, or request for admission as provided for in Rule 36. If the other party is aggrieved, he may immediately appeal the action of the clerk's office to one of the district judges.

(3) Consent orders extending for not more than thirty days the time to file the record on appeal and to docket the appeal in the appellate court, except in criminal cases.

(4) Consent orders dismissing an action, except in bankruptcy proceedings and in causes to which Rule 23(c) and Rule 66, Federal Rules of Civil Procedure, apply.

(5) Judgments of default as provided for in Rule 55(a) and 55(b) (1), Federal Rules of Civil Procedure.

(6) Orders cancelling liability on bonds.

(7) Orders changing the time of opening and adjourning court in absence of the judge.

(8) Judgments authorized by Rule 58, Federal Rules of Civil Procedure.

Rule 7. Motion, Pre-trial and Settlement Conference.

There shall be one Motion, Pre-trial and Settlement conference — hereinafter called pre-trial conference — in every civil case, unless the parties, with the court's approval, agree not to have one. Insofar as practicable, all motions shall be heard and ruled on at this pre-trial conference. An effort will be made to simplify the issues and the possibility of settlement will be discussed, provided that any party has the right to decline to discuss settlement and insist on immediate trial. After being fully advised by counsel, the Court will dictate a pre-trial order (See Form 1 in the appendix to these rules) to accomplish the following:

(1) Make or permit to be made such changes, if any, to the pleadings as may be necessary or desirable.

(2) Rule on any motions pending and make provision for the disposition of motions that may subsequently arise.

(3) Set a termination date for the completion of all discovery procedures.

(4) Set a trial date.

(5) Require inspection of all exhibits before trial and a listing of exhibits.

(6) Avoid questions of authenticity of documents — unless authenticity is a genuine issue.

Ordinarily, only one such pre-trial conference will be held.

Except where special hearings are convened at request of counsel, the clerk's office will prepare and mail a pre-trial calendar at least ten days before the hearing date. All cases at issue will be scheduled. The calendar will disclose the time of day in fifteen minute, half-hour, and hour intervals for such conferences so as to delay and inconvenience counsel to the minimum possible extent. In the ordinary case, the pre-trial conference will not exceed thirty minutes duration. Since cases cannot be put on the trial calendar until motions have been ruled upon, and pre-trial order entered, motions for continuances of such hearings will ordinarily be denied. Although it is better for counsel in charge of the case to attend, the presence of associate or junior counsel will usually suffice and prevent unnecessary delay. Counsel need not prepare briefs in advance of a pre-trial hearing. Questions of law will be discussed at the conference and agreement reached as to necessity and scope of briefs, if any, and the time for filing same.

Rule 8. Motions in Civil Actions.

Unless made during a hearing or trial, all motions must be put in writing and shall state with particularity the grounds of the motion and shall set forth the relief or order sought.

Ordinarily, motions will be heard and determined at pre-trial conference. (Rule 7.) As to motions which arise *after* pre-trial conference, or which ought to be determined *prior* thereto, the court will ordinarily determine such motions without oral hearing upon brief written statements of reasons in support and opposition. (Rule 78, Federal Rules of Civil Procedure.) Such statements may be simply prepared in letter form. Where it is thought necessary or desirable, the court may order a hearing.

A. Conference of Attorneys with Respect to Motions and Objections Relating to Discovery. With respect to all motions and objections relating to discovery, pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, counsel for each of the parties shall meet and confer in advance of any hearing in a good faith effort to narrow the areas of disagreement.

B. Motions for an Extension of Time to Perform an Act. All motions for an extension of time to perform an act required or allowed to be done within a specified time *must* show prior consultation with opposing counsel, and the views of opposing counsel with respect to the extension.

Rule 9. Opening Statements in Civil Actions.

At the commencement of the trial of civil actions, the party upon whom rests the burden of proof may state, briefly and without argument, his cause of action and the evidence by which he expects to sustain his claim. The adverse party may then state, briefly and without argument, his defense and the evidence by which he expects to sustain same. If the trial is to the jury, the opening statement shall be made immediately after the jury is empaneled. If the judge, in the course of questioning the prospective jurors, has sufficiently explained the nature of the case, the parties may elect to waive opening statements. If the trial is to the court, the opening statement shall be made immediately after the case is called for trial, and may likewise be waived. Opening statements shall be subject to such time limitations as may be imposed by the court.

Pleadings will not be read.

Rule 10. Discovery.

The importance of discovery to federal practice cannot be overemphasized. Counsel are *required* to begin such discovery procedures as will be utilized (Rules 26-37) *promptly* after the case is at issue and are encouraged to begin even before issue is joined. Counsel will *not* wait until pre-trial conference is imminent to begin discovery. Ordinarily, no more than ninety days will be allowed after issue is joined within which time to complete discovery. In the exceptionally difficult case more time may be allowed.

Rule 11. Fair Trial and Free Press in Criminal Cases.

A. It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

B. All courthouse personnel, including among others, marshals, deputy marshals, court clerks, bailiffs, and court reporters shall not disclose to any person, without authorization by the court, information concerning arguments and hearings in criminal cases held in chambers or otherwise outside the presence of the public, or disclose any other information relating to a pending criminal case that is not a part of the public records of this court.

C. In a widely publicized or sensational case, the court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the court may deem appropriate for inclusion in such an order. (Adopted April 29, 1969.)

Rule 12. Forfeiture of Collateral Security in Lieu of Appearance.

Pursuant to Rule 4 of the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates and Title 28, United States Code, Section 636(b) (3), in the interest of justice, good court administration, and sound law enforcement, for the offenses listed on the attached forty-five (45) pages — whether originating under the applicable federal statutes or regulations or applicable state statutes by virtue of the Assimilated Crimes Act (Title 18, United States Code, Section 13) — occurring within the territorial jurisdiction of the United States Magistrate, collateral may be posted in lieu of the appearance of the offender unless:

(1) The offense is denominated as one for which appearance is mandatory, or

(2) It is the opinion of the arresting or citing officer that the offense charged was aggravated.

Upon the failure of the person charged with an offense or offenses to appear before the United States Magistrate for trial of the offense or offenses listed on the attached forty-five (45) pages, except those offenses denominated "mandatory appearance," and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the person charged consents to such collateral forfeiture and does not contest the charge or request a hearing before the United States Magistrate. No forfeiture of collateral will be permitted for a subsequent offense or offenses not arising out of the same facts or sequence of events resulting in the original offense or offenses.

If a defendant fails to post such collateral or request a hearing, the clerk of the district court or the magistrate shall issue a notice for the defendant to post the collateral or request a hearing within seven (7) days. If a defendant fails to respond to such notice, and *if* the essential facts of the offense are sufficient to establish probable cause and are supported by oath or under penalty of perjury, the magistrate may issue an arrest warrant or, if no warrant is requested by the attorney for the government, a summons, in accordance with Rule 4(c) of the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates. Such arrest warrant or summons may provide that the defendant pay a fixed sum, not to exceed the maximum fine which could be imposed upon conviction, in lieu of personal appearance before the magistrate.

The clerk or magistrate shall certify the record of any applicable traffic violation to the proper state authority.

There shall be maintained in the office of the clerk and with each United States Magistrate a current list of the offenses and fines applicable thereto for which forfeiture of collateral security may be accepted.

Pursuant to the foregoing provisions, the offenses for which collateral may be posted in lieu of appearance by the person charged with the said offense are listed on the attached nineteen (19) pages.

FORFEITURE OF COLLATERAL SCHEDULE

Section	**Agency**
I	National Park Service
II	National Forest Service
III	National Fish and Wildlife
IV	Cherokee Indian Reservation
V	W. Kerr Scott Dam and Reservoir
VI	Veterans Administration Facilities
VII	General Services Administration

I.

NATIONAL PARK SERVICE VIOLATIONS

Part II, Title 36, Chapter I, Code of Federal Regulations

[Maximum possible penalty for each charge — $500 fine, or six months' imprisonment, or both — unless otherwise specified]

Section Number	*Offense*	*Collateral*
1.5(f)	Violating closures, visiting hours, and public use limits	$ 25.00
1.6(h)	Violating terms and conditions of a permit for public use limits and activities	25.00
2.1(a)(1)	Possessing, destroying, injuring, defacing, or disturbing natural, cultural, or archeological resources (minor)	50.00
2.1(a)(2)	Introducing wildlife, fish, or plants into the Park ecosystem (minor)	50.00
2.1(a)(3)	Throwing, rolling rocks inside caves or down hillsides	25.00
2.1(a)(4)	Using or possessing wood unlawfully gathered in the Park	25.00
2.1(a)(5)	Unauthorized walking on, entering, traversing, etc., archeological or cultural resource	MANDATORY
2.1(a)(6)	Possessing, destroying, removing, defacing, etc., archeological or cultural resources (major)	MANDATORY
2.1(a)(7)	Possessing or using metal or mineral detectors	50.00
2.1(b)	Failing to stay on designated trail (shortcutting)	25.00
2.1(c)2(3)	Unauthorized gathering, possessing, or removing of natural products (minor)	25.00
2.2(a)(1)	Unauthorized taking of wildlife	MANDATORY
2.2(a)(2)	Feeding, frightening, or disturbing wildlife	25.00
2.2(a)(3)	Possessing unlawfully taken wildlife	MANDATORY
2.2(a)(4)	Unlawfully discharging a weapon	50.00
2.2(d)	Unauthorized transportation of lawfully taken wildlife	25.00
2.2(e)	Unauthorized use of artificial light to view wildlife (minor)	50.00
2.3(a)	Fishing in violation of State laws	25.00
2.3(d)(1)	Fishing with other than hook and line	50.00
2.3(d)(2)	Possessing or using bait for fishing	50.00
2.3(d)(3)	Chumming for fish	25.00
2.3(d)(4)	Unauthorized commercial fishing	MANDATORY
2.3(d)(5)	Fishing with drugs, poisons, explosives, or electricity	MANDATORY
2.3(d)(6)	Digging for bait	25.00
2.3(d)(7)	Failing to carefully and immediately return illegal fish to water	25.00
	Plus, for each illegal fish	25.00
	Possession of prohibited species	50.00
2.3(d)(8)	Fishing from bridges or in undesignated areas	25.00
2.4(a)	Unauthorized possessing, using, discharging, or carrying a weapon, trap, or net	25.00
2.4(b)	Unauthorized carrying or possessing a loaded weapon in a motor vehicle or vessel	50.00
2.4(c)	Use of weapon, trap, or net that endangers persons or property	MANDATORY
2.4(d)	Possessing weapon, trap, or net in violation of permit	25.00
2.4(f)	Possessing weapon, trap, or net in violation of federal or State law	MANDATORY
2.5(a)	Collecting scientific specimens without a permit	25.00
2.5(h)	Violating conditions of specimen collection permit	25.00
2.10(b)(1)	Digging or leveling at campsite	25.00
2.10(b)(2)	Leaving camping equipment, site alterations, or refuse after departing campsite	25.00
2.10(b)(3)	Camping too close to water source	25.00
2.10(b)(4)	Violating quiet hours	25.00
2.10(b)(5)	Installing permanent camp	25.00
2.10(b)(6)	Displaying wildlife carcasses in camp	25.00
2.10(b)(7)	Unauthorized connecting to utility systems	25.00
2.10(b)(8)	Failing to obtain camping permit	25.00

Section Number	*Offense*	*Collateral*
2.10(b)(9)	Violating camping conditions set by superintendent	$ 25.00
2.10(b)(10)	Camping outside designated area	25.00
2.10(c)	Violating conditions of camping permit	25.00
2.10(d)	Violating food storage requirements	25.00
2.11	Unauthorized picnicking	25.00
2.12	Audio disturbances (unreasonable noise)	25.00
2.13(a)(1)	Fire in undesignated area	25.00
2.13(a)(2)	Violating restrictions on use of stove or lantern	25.00
2.13(a)(3)	Lighting or using a fire, stove, or lantern that threatens or damages property or creates hazard	50.00
2.13(a)(4)	Leaving a fire unattended	50.00
2.13(a)(5)	Discarding burning material that threatens or damages property or creates hazard	50.00
2.13(b)	Failing to extinguish a fire	25.00
2.14(a)(1)	Failing to use refuse receptacle (littering) (minor)	50.00
2.14(a)(2)	Unauthorized use of government receptacle for private refuse	100.00
2.14(a)(3)	Placing refuse in toilet facility	25.00
2.14(a)(4)	Unauthorized draining of refuse from trailer/vehicle	50.00
2.14(a)(5)	Bathing or washing at other than designated public water outlets	25.00
2.14(a)(6)	Polluting or contaminating water source	50.00
2.14(a)(7)	Improper disposal of fish remains	25.00
2.14(a)(8)	Improper disposal of body waste (developed areas)	50.00
2.14(a)(9)	Improper disposal of body waste (undeveloped areas)	25.00
2.14(b)	Violating conditions for disposal, containerization, or carryout of body waste	25.00
2.15(a)(1)	Possessing a pet in a public building, swimming beaches, or other area closed to pets	25.00
2.15(a)(2)	Failing to restrain (leash) pet	25.00
2.15(a)(3)	Leaving pet unattended	25.00
2.15(a)(4)	Allowing pet to make unreasonable noise	25.00
2.15(a)(5)	Failing to remove pet excrement	25.00
2.15(d)	Pets running at large	50.00
	(Note: Plus, when such pets are impounded, reimbursement is to be paid to the Park for costs of kennel or boarding, feed, transportation, and veterinarian services)	
2.15(e)	Violating conditions allowing pets to be kept by Park residents	25.00
2.16	Improper use of horses and pack animals	25.00
2.17	Illegal use of aircraft and air delivery	MANDATORY
2.18	Violating snowmobile regulations	25.00
2.19	Violating restrictions on winter activities (skiing, sledding, towing skiers, etc.)	25.00
2.20	Using skates, skateboards, or similar devices in undesignated areas	25.00
2.21	Smoking in designated no-smoking areas	25.00
2.22	Abandoning or leaving property unattended or failing to turn in found property	25.00
2.23	Entering or using a fee area without paying fee [MAXIMUM PENALTY: fine not to exceed $100]	25.00
2.30	Unlawfully possessing property or obtaining property or services fraudulently	MANDATORY
2.31	Trespassing, tampering, vandalism (minor)	100.00
2.32	Interfering with agency functions (resisting, violating lawful order, false report, etc.) (minor)	100.00
2.33	Failing to report injury or property damage in excess of $100	MANDATORY
2.34	Disorderly conduct	MANDATORY
2.35(a)(2)(i)	Sale or gift of alcohol to a minor	MANDATORY
2.35(a)(2)(ii)	Possession of alcohol by a minor	MANDATORY
2.35(a)(2)(iii) & (iv)	Carrying or storing an opened container of alcohol in passenger area of vehicle	50.00
2.35(a)(3)	Possessing alcohol in undesignated area	25.00
2.35(b)(1)	Delivery of a controlled substance	MANDATORY

Section Number	*Offense*	*Collateral*
2.35(b)(2)	Possession of a controlled subsatance	MANDATORY
2.35(c)	Under the influence of alcohol or a controlled substance	MANDATORY
2.36	Gambling or operating gambling devices	MANDATORY
2.37	Unauthorized noncommercial soliciting for gifts, money, goods, or services	$ 25.00
2.38(a)	Unauthorized using, possessing, storing, or transporting explosives	MANDATORY
2.38(b)	Unauthorized using or possessing of fireworks	25.00
2.38(c)	Violating conditions of explosives permit	25.00
2.50	Violating conditions of special event permit (minor)	50.00
2.51	Unauthorized public assemblies, meetings, parades, etc. (minor)	50.00
2.52	Unauthorized sale or distribution of printed matter	100.00
2.60	Prohibited livestock or agriculture use (minor)	25.00
2.61	Unauthorized residing in Park areas	MANDATORY
2.62	Unauthorized memorialization	25.00
3.6	Prohibited boating operations (reckless operation, improper riding, size restrictions, etc.)	MANDATORY
3.21	Swimming or bathing in undesignated areas, and use of unauthorized water sports equipment	25.00

Part IV, Title 36, Chapter I, Code of Federal Regulations

4.1 State Laws Applicable:

NCGS Section	*Offense*	*Collateral*
20-28	Operating a motor vehicle with a suspended or revoked license (MPP: Not less than $200 or more than 2 years/both)	MANDATORY
	Operating a motor vehicle with a permanently suspended or revoked license (MPP: Not less than 1 year)	MANDATORY
20-30(1)	Possessing an operator's license which was cancelled, revoked, suspended, or altered (MPP: $500/6 months)	MANDATORY
20-32	Allowing unlicensed minor to drive a motor vehicle (MPP: $500/6 months)	MANDATORY
20-63	Displaying license plate which is mutilated, partially covered, not reasonably clean, or in other than a horizontal, upright position (MPP: $100/60 days/both)	$ 25.00
20-111(2)	Operating a motor vehicle with an altered, suspended, cancelled, revoked, or fictitious registration card, title, or license plate (MPP: $100/60 days/both)	MANDATORY
20-116(b)	Operating a passenger-type vehicle with a load extending beyond the left side fenders or 6″ beyond the right side fenders (MPP: $100/60 days/both)	25.00
20-122.1	Operating a motor vehicle with unsafe tires (MPP: $100/60 days/both) [Defense: Correct within 15 days]	25.00
20-123(b)	Towing another vehicle with improper or unsafe towing equipment (MPP: $100/60 days/both)	25.00
20-126(a)	No rearview mirror (MPP: $100/60 days/both)	25.00
20-126(b)	No outside mirrors (models after 1966) (MPP: $100/60 days/both)	25.00
20-127(a)	Obstructed windshield (MPP: $100/60 days/both)	25.00
20-127(b)	Nonfunctioning windshield wipers (MPP: $100/60 days/both)	25.00
20-127(c)	Discoloration of windshield or rear or side glass (MPP: $100/60 days/both)	25.00
20-129(a)	Failing to burn headlights and taillights when visibility is under 400 feet (MPP: $100/60 days/both)	25.00
20-129(b)	Failing to have at least two headlights in good working order — one on each side (MPP: $100/60 days/both)	25.00
20-129(c)	Operating a motorcycle without headlight on (daylight hours) (MPP: $100/60 days/both)	25.00
20-129(d)	Operating a motorcycle without the taillight on (daylight hours) (MPP: $100/60 days/both)	25.00

4.1 (Cont'd) State Laws Applicable:

NCGS Section	*Offense*	*Collateral*
20-129(g)	Failing to have at least one stop light in good working order (MPP: $100/60 days/both)	$ 25.00
20-140.2	Vehicle overloaded or crowded so as to obstruct driver's view or impair proper operation (MPP: $100/60 days/both)	25.00
20-140.4(1)	Operating motorcycle with more people than it was designed to carry (MPP: $100/60 days/both)	25.00
20-140.4(2)	No safety helmet on while operating or a passenger on a motorcycle (MPP: $100/60 days/both)	25.00
20-141(m)	Failing to decrease speed to avoid a collision (MPP: $100/60 days/both)	25.00
20-141.3(b)	Engaging in speed competition with another vehicle (MPP: Not less than $50 nor more than 2 years, or both)	MANDATORY
20-146(a)	Failing to keep vehicle on right half of the road (MPP: $100/60 days/both)	25.00
20-146.1(b)	Operating motorcycles more than two abreast (MPP: $100/60 days/both)	25.00
20-148	Failing to give oncoming vehicle at least half of the road (MPP: $100/60 days/both)	25.00
20-149(a)	Failing safely to clear a passed vehicle before returning to right side of the road (MPP: $100/60 days/both)	25.00
20-149(b)	Failing to give audible signal when passing vehicle (MPP: $100/60 days/both)	25.00
20-150(a)	Passing another vehicle when left side of road was not clear for a sufficient distance (MPP: $100/60 days/both)	25.00
20-150(b)	Passing on the crest of a grade or curve when view was obstructed within 500 feet (MPP: $100/60 days/both)	25.00
20-150(c)	Passing in a marked intersection (MPP: $100/60 days/both)	25.00
20-150(d)	Driving to the left of the center line upon the crest of a grade or curve (MPP: $100/60 days/both)	25.00
20-150(e)	Passing in marked or posted no-passing zone (MPP: $100/60 days/both)	25.00
20-151	Failure of overtaken vehicle to give way to the right in favor of the overtaking vehicle (MPP: $100/60 days/both)	25.00
20-154(b)	Failing to give a turn signal (MPP: $100/60 days/both)	25.00
20-155(a)	Failing to yield to the right at an intersection (MPP: $100/60 days/both)	25.00
20-155(b)	Failing to yield, when turning left, to oncoming traffic (MPP: $100/60 days/both)	25.00
20-158(b)(1)	Failing to yield, when at a stop intersection, to thru traffic (MPP: $100/60 days/both)	25.00
20-174.1(a)	Standing, sitting, or lying upon the road so as to impede traffic (MPP: $500/6 months/both)	25.00
20-181	Failing to dim headlights when meeting an oncoming vehicle or following another vehicle within 200 feet (MPP: $10/10 days)	10.00
20-183.2(a)	No current inspection sticker (MPP: $50/30 days) [Defense: Provide inspection certificate receipt within 30 days of expiration]	25.00
20-313	Owning and operating, or permitting operation of, a motor vehicle without financial responsibility (insurance) (MPP: Fined or imprisoned in discretion of court, misdemeanor)	MANDATORY
4.3	Violation of bicycle regulations	25.00
4.4	Failing to give notice of commercial towing	50.00
4.5	Driving, or permitting another to drive, a vehicle without a valid license, or failing to display a valid license	MANDATORY
4.6	Driving under the influence of intoxicants or drugs	MANDATORY
4.7	Entering or leaving a Park by vehicle at other than established places and hours	25.00
4.8	Excessive acceleration of motor vehicle engine when stopped or approaching or leaving a stopping place	25.00

4.1 (Cont'd) State Laws Applicable:

NCGS Section	*Offense*	*Collateral*
4.10	Following another vehicle closer than is reasonable and prudent	$ 25.00
4.11(a-e)	Violation of vehicle load, weight, length, and width limitations	25.00
4.12	Use of defective muffler, muffler cutout, or similar device	25.00
4.13	Obstructing traffic by stopping or leaving a vehicle unattended	50.00
4.14	Failure to Control Vehicle — failure of vehicle operator to maintain control of the vehicle necessary to avoid danger to persons, property, or wildlife	25.00
	Careless Driving — driving or operating a vehicle carelessly, or without due care, or at a speed greater than reasonable and prudent under prevailing conditions, having regard to traffic, wildlife, weather, road and light conditions, etc.	50.00
	Reckless Driving — driving or operating a vehicle recklessly or in a willful or wanton disregard for the rights or safety of other persons or property	MANDATORY
4.15(a)	Failure to report accident resulting in damage to property or injury or death to any person	MANDATORY
4.15(b)	Failure of vehicle operator involved in accident to give at time and place of incident his name and address and I.D. of vehicle to operator or owner of other property involved	MANDATORY
4.15(c)	Failure of vehicle operator involved in collision with unattended vehicle to leave in secure and conspicuous place written notice of name and address of operator and information regarding the moving vehicle	MANDATORY
4.15(d)	Failure of vehicle operator involved in collision immediately to notify superintendent or provide written report within 24 hours when requested by authorized person	MANDATORY
4.16(a)	Failure to yield right-of-way to emergency vehicle	50.00
4.16(b)	Failure to yield right-of-way to pedestrians and livestock	25.00
4.17	Exceeding speed limits:	
	1-10 m.p.h. over applicable limit	25.00
	11-15 m.p.h. over applicable limit	30.00
	16-20 m.p.h. over applicable limit	50.00
	21 m.p.h. or more over applicable limit	MANDATORY
4.18(a)	Failure to comply with signs regulating parking	15.00
4.18(a)	Failure to comply with traffic control signs	25.00
4.18(b)	Failure to obey an order given by an authorized person directing traffic	50.00
4.18(c)	Failure to obey visual and audible signals given by any authorized person directing the operator to bring his motor vehicle to a stop	50.00
4.19(a & b)	Motor vehicle travel off established roads or parking areas	50.00
4.19(c)(2)	Operating a motor vehicle that will damage the roadway	100.00
4.20	Operating a vehicle without valid license plates and proper state registration	50.00
	Failure to display proof of ownership or State registration upon request	50.00
4.21	Operating a motor vehicle with unsafe brakes	50.00
4.22	Hitchhiking or soliciting transportation	25.00
	Parts V, VI, and VII, Title 36, Chapter I, Code of Federal Regulations	
5.1	Advertising in Park area without a permit	75.00
5.2(a)	Commercial or private sale of alcoholic beverages or intoxicants	MANDATORY
5.3	Unauthorized soliciting or engaging in business	50.00
5.4(a)	Unauthorized commercial passenger-carrying motor vehicle	50.00
5.5	Commercial photography, motion pictures filming, and television or sound track production, without permit	100.00

NCGS Section	*Offense*	*Collateral*
5.6	Unauthorized use of commercial vehicles on Park area roads:	
	Pickup trucks, station wagons, vans, and cars	$ 50.00
	Trucks over one and one-half tons and semitrailers	100.00
5.7	Constructing buildings or any public or private facilities without permit or agreement with United States	MANDATORY
5.8	Discrimination in employment practices	MANDATORY
5.9	Discrimination in furnishing public accommodations and transportation services	MANDATORY
5.14	Prospecting, mining, locating mining claims, and leasing in Park areas, except as authorized by law	MANDATORY
7.14(a)	Fishing within the Smoky Mountain National Park in violation of regulations as to:	
	(1) No valid license	25.00
	(2) Closed or excluded waters	25.00
	(5) Other than daylight hours	25.00
	(6) Bait fishing	25.00
	(7) Size limits	25.00
	Plus, for each undersize fish	25.00
	(8) Exceeding creel limit	25.00
	(11) Experimental waters	50.00
7.14(b)	Possession of beer and alcoholic beverages	25.00
7.34(b)	Fishing within the Blue Ridge Parkway boundaries in violation of regulations as to places, times, bait, creel, and size limits	25.00
	Plus, for each fish undersize or over creel limit	25.00
7.34(f)	Commercial hauling on the Blue Ridge Parkway without a special permit, or violation of restrictions in such permit	50.00
7.34(g)	Commercial passenger-carrying buses on the Blue Ridge Parkway without special permit	50.00
7.34(g)(6)	Violating permitted uses (carrying passengers, baggage, and equipment for vacation or recreational purposes) of certain vehicles designated noncommercial when so used	50.00
7.34(k)	Use of bicycles on the Blue Ridge Parkway except on designated and posted trails	25.00
7.34(l)	Use of boats or vessels on waters of Blue Ridge Parkway	25.00
7.100(a)	Use of bicycles, motorcycles, snowmobiles, or other motor vehicles on Appalachian National Scenic Trail	50.00
7.100(b)	Horses or pack animals in prohibited areas of Appalachian National Scenic Trail	50.00

(Other miscellaneous state statutes not specifically covered in the Code of Federal Regulations)

Assimilated Crimes Act, 18 U.S.C. Section 13:

NCGS Section	*Offense*	
14-269	Carrying a concealed weapon about one's person, except on own premises (MPP: $500/6 months/both)	MANDATORY
90-113.22	Possession of drug paraphernalia with intent to use (MPP: $500/1 year/both)	MANDATORY
113-291.1(b)(2)	Taking, or attempting to take, wildlife with the use of an artificial light, electronic recorded call, or fire (MPP: $10-$50/30 days — 1st offense)	MANDATORY
	All pleas of not guilty	MANDATORY
	All felonies	MANDATORY
	Defendant charged with more than one violation (other than multiple collateral fishing violations)	MANDATORY

II.

NATIONAL FOREST SERVICE VIOLATIONS

Title 36, Chapter II, Code of Federal Regulations

[Maximum possible penalty for each charge — $500 fine, or six months' imprisonment, or both]

Section Number	*Offense*	*Collateral*
261.3(a)	Interfering with a forest officer	MANDATORY
	Interfering with a volunteer or a hosted enrollee	MANDATORY
261.3(b)	Giving a false report	MANDATORY
261.4(a)	Fighting	$ 50.00
261.4(b)	Communication tending to cause violence	50.00
261.4(c)	Actions tending to incite lawlessness	MANDATORY
261.4(d)	Unreasonable noise	50.00
261.5(a)	Throwing or placing ignited substance	MANDATORY
261.5(b)	Firing tracer	MANDATORY
261.5(c)	Burning without a permit	MANDATORY
261.5(d)	Not extinguishing campfire	25.00
261.5(e)	Allowing fire to escape	MANDATORY
261.5(f)	Campfire, flammable clearance	25.00
261.6(a)	Cutting timber and vegetation without a permit	25.00
261.6(b)	Cutting timber under permit prior to marking	MANDATORY
261.6(c)	Removing timber under permit prior to scaling	MANDATORY
261.6(d)	Illegally stamping or marking timber	MANDATORY
261.6(e)	Transporting timber cut under permit without required identification	MANDATORY
261.6(f)	Selling timber obtained under free use permit	50.00
261.6(g)	Violating timber export restrictions	MANDATORY
261.6(h)	Removing timber without a permit	50.00
261.7(a)	Unauthorized livestock	25.00
261.7(b)	Failure to remove livestock	25.00
261.7(c)	Failure to reclose gate	25.00
261.7(d)	Releasing or removing impounded livestock	MANDATORY
261.8(a)	Hunting, trapping, fishing	25.00
	Exceeding creel or bag limit	25.00
	Plus, for each fish over limit	10.00
	Keeping undersize fish	25.00
	Plus, for each fish undersize	10.00
261.8(b)	Possession of a firearm	25.00
261.8(c)	Possession of hunting or trapping equipment	25.00
261.8(d)	Possession of dog unconfined	25.00
261.9(a)	Damaging natural feature or property	25.00
261.9(b)	Removing natural feature or property	25.00
261.9(c)	Damaging endangered or sensitive plants	25.00
261.9(d)	Removing endangered or sensitive plants	50.00
261.9(e)	Entering building closed to the public	MANDATORY
261.9(f)	Herbicide or pesticide use	MANDATORY
261.9(g)	Disturbing or damaging archaeological site	MANDATORY
261.9(h)	Removing historic or archaeological artifact or resource	MANDATORY
261.10(a)	Constructing or maintaining improvements	50.00
261.10(b)	Squatting (illegal occupancy)	MANDATORY
261.10(c)	Selling merchandise without a permit	50.00
261.10(d)	Discharging firearms	50.00
261.10(e)	Abandoning personal property	50.00
261.10(f)	Placing a vehicle or object in unsafe manner	25.00
261.10(g)	Posting a sign or notice without a permit	25.00
261.10(h)	Noise pollution	25.00
261.10(i)	Public address system use without a permit	25.00
261.10(j)	Public assembly or special event without a permit	25.00
261.10(k)	Violating the terms of a permit	50.00

Section Number	*Offense*	*Collateral*
261.10(l)	Failing to stop vehicle on officer's order	$ 50.00
261.11(a)	Depositing damaging articles in toilets or plumbing	50.00
261.11(b)	Leaving refuse in unsanitary condition	50.00
261.11(c)	Water pollution	MANDATORY
261.11(d)	Littering or failing to remove litter or use receptacles provided	25.00
261.11(e)	Dumping into government receptacles from private property	50.00
261.12(a)	Violating load and height limitations	50.00
261.12(b)	Failing to weigh vehicle at Forest Service weight station	MANDATORY
261.12(c)	Leaving road or trail in damaged condition	50.00
261.12(d)	Blocking road, trail, or gate	25.00
261.12(e)	Motorized vehicle greater than 40″ width on trails	25.00
261.13	Operating vehicles off roads prohibited, as follows:	
	(a) Without valid license as required by State	25.00
	(b) Without braking system	25.00
	(c) Without lights during hours of darkness	25.00
	(d) In violation of noise standards	25.00
	(e) Under influence of alcohol or drugs	MANDATORY
	(f) Creating excessive smoke	25.00
	(g) Reckless driving	25.00
	(h) Damaging land, vegetation, or wildlife	25.00
	(i) In violation of State off-road laws	25.00
261.14	Prohibited at developed recreational sites:	
	(a) Occupying site for other than recreation	25.00
	(b) Building fire outside of Forest Service stoves	25.00
	(c) Cleaning fish and animals at Forest Service hydrant	25.00
	(d) Illegal fireworks	25.00
	(e) Unlawfully occupying day-use-only sites	25.00
	(f) Failing to remove camping gear and other equipment	25.00
	(g) Camping in other than designated site	25.00
	(h) Failing to occupy site first night	25.00
	(i) Leaving camping equipment more than 24 hours	25.00
	(j) Unleashed animals	25.00
	(k) Animals in swimming area	25.00
	(l) Horses or pack animals in campsite	25.00
	(m) Illegal parking	25.00
	(n) Motorbikes or bicycles on camp trails	25.00
	(o) Motorbike or motor vehicles used for other than entering or leaving site	25.00
	(p) Distributing handbills or circulars without a permit	25.00
	(q) Depositing body waste in other than provided receptacles	25.00
261.15	Failing to pay fees	15.00
261.16	Prohibited in a National Forest Wilderness:	
	(a) Possessing or using motorized equipment	50.00
	(b) Possessing or using hang gliders or bicycles	25.00
	(c) Landing or unauthorized use of aircraft	MANDATORY
261.19	Prohibited in National Forest Primitive Areas:	
	(a) Landing aircraft or using boat where not in use prior to 9/3/64	MANDATORY
	(b) Possessing or using motorized equipment	50.00
261.20(a)	Manufacturing, importing, reproducing, or using "Smokey Bear" symbol without a permit	50.00
261.20(b)	Manufacturing, importing, reproducing, or using "Woodsy Owl" symbol without a permit	50.00
261.52	When provided by an order, the following are prohibited:	
	(a) Building, maintaining, attending, or using a fire, campfire, or stove fire	25.00
	(b) Using an explosive	25.00
	(c) Smoking	25.00
	(d) Smoking, except within an enclosed vehicle or building or a developed recreation site	25.00

Section Number	*Offense*	*Collateral*
261.52 (Cont'd)	(e) Going into or being upon an area	$ 25.00
	(f) Possessing, discharging, or using any kind of firework or other pyrotechnic device	25.00
	(g) Entering an area without any firefighting tool prescribed by the order	25.00
	(h) Operating an internal combustion engine	25.00
	(i) Welding, or operating an acetylene or other torch with open flame	25.00
	(j) Operating or using an internal or external combustion engine without a spark-arresting device properly installed, maintained, and in effective working order	25.00
	(k) Violating any State law specified in the order concerning burning, fires, or which is for the purpose of preventing or restricting the spread of fires	25.00
261.53	When provided in an order, it is prohibited to go into or be upon any area which is closed for the protection of:	
	(a) Threatened, endangered, rare, unique, or vanishing species of plants, animals, birds, or fish	25.00
	(b) Special biological communities	25.00
	(c) Objects or areas of historical, archaeological, geological, or paleontological interest	25.00
	(d) Scientific experiments or investigations	25.00
	(e) Public health or safety	25.00
	(f) Property	25.00
261.54	When provided in an order, the following are prohibited on Forest Development Roads:	
	(a) Using any type of prohibited vehicle	25.00
	(b) Using by any type of prohibited traffic	25.00
	(c) Unauthorized using for commercial hauling	25.00
	(d) Operating a vehicle in violation of the speed, load, weight, height, length, width, or other limitations specified by order; or	25.00
	1. Operating motorized vehicle without a valid driver's license	25.00
	2. Operating motorized vehicle without valid license plates and registration	25.00
	3. Operating motorized vehicle without proper and workable safety equipment	25.00
	4. Failure to display valid driver's license upon request of any authorized Forest Officer	25.00
	5. Operating a vehicle while under the influence of intoxicating liquor or drugs	MANDATORY
	(e) Being on the road	25.00
	(f) Operating a vehicle carelessly, recklessly, or without regard for the rights or safety of other persons or in a manner or at a speed that would endanger or be likely to endanger any person or property	50.00
261.55	When provided in an order, the following are prohibited on Forest Development Trails:	
	(a) Being on the trail	25.00
	(b) Using a bicycle or motorized vehicle	25.00
	(c) Possessing or using a saddle, pack, or draft animal	25.00
	(d) Shortcutting a switchback	25.00
261.56	When provided by an order, it is prohibited to possess or use a vehicle off Forest Development Roads	25.00
261.57	When provided by an order, the following are prohibited in National Forest Wilderness Areas:	
	(a) Entering or being in the area	25.00
	(b) Possessing specified camping or pack-outfitting equipment	25.00
	(c) Possessing a firearm or firework	25.00
	(d) Possessing any nonburnable food or beverage containers, including deposit bottles, except those containers designed and intended for repeated use	25.00

Section Number	*Offense*	*Collateral*
261.57 (Cont'd)	(e) Grazing	$ 25.00
	(f) Storing equipment, personal property, or supplies	25.00
	(g) Disposing of debris, garbage, or other waste	25.00
	(h) Possessing or using a bicycle, wagon, cart, or other vehicle	25.00
261.58	When provided by an order, the following are prohibited:	
	(a) Camping for a period longer than allowed by the order	25.00
	(b) Entering or using a developed recreation site or portion thereof	25.00
	(c) Entering or remaining in a campground during night periods prescribed in the order except for persons who are occupying such campgrounds	25.00
	(d) Occupying a developed recreation site with prohibited camping equipment prescribed by the order	25.00
	(e) Camping	25.00
	(f) Using a campsite or other specified area by more than the number of users allowed by the order	25.00
	(g) Parking or leaving a vehicle in violation of posted instructions	25.00
	(h) Parking or leaving a vehicle outside a parking space assigned to one's own camp unit	25.00
	(i) Possessing, parking, or leaving more than two vehicles, except motorcycles or bicycles, per camp unit	25.00
	(j) Being publicly nude	25.00
	(k) Entering or being in a body of water	25.00
	(l) Being in the area after sundown or before sunrise	25.00
	(m) Discharging a firearm, air rifle, or gas gun	25.00
	(n) Possessing or operating a motorboat	25.00
	(o) Water skiing	25.00
	(p) Storing or leaving a boat or raft	25.00
	(q) Operating any watercraft in excess of a posted speed limit	25.00
	(r) Launching a boat except at a designated launching ramp	25.00
	(s) Possessing or transporting a bird or animal	25.00
	(t) Possessing or transporting any part of a tree or plant	25.00
	(u) Being in the area between 10 p.m. and 6 a.m. except person who is camping or visiting a person camping in that area	25.00
	(v) Hunting or fishing in restricted areas	25.00
	(w) Possessing or transporting any motor or mechanical device capable of propelling a watercraft through water by any means	25.00
	(x) Using any wheel, roller, or other mechanical device for the overland transportation of any watercraft	25.00
	(y) Landing of aircraft, or dropping or picking up any material or person by means of any aircraft, including a helicopter	25.00
	(z) Entering or being on lands or waters within the boundaries of a component of the National Wild and Scenic Rivers System	25.00
	(aa) Riding, hitching, tethering, or hobbling a horse or other saddle or pack animal in violation of posted instructions	25.00
	(bb) Possessing a beverage which is defined as an alcoholic beverage by State law	25.00
	All pleas of not guilty	MANDATORY
	At discretion of United States Attorney, pursuant to 18 U.S.C. Section 13, any violation of State law, including felonies	MANDATORY
	All federal felonies	MANDATORY
	Defendant charged with more than one violation (other than multiple collateral fishing violations)	MANDATORY

III.

NATIONAL FISH AND WILDLIFE VIOLATIONS

Title 50, Chapter I, Code of Federal Regulations
and
Title 16, United States Code

CFR Section Number	*Offense*	*Collateral*
MIGRATORY BIRD TREATY ACT (16 USC § 703):		
	Take or possess migratory nongame birds	$ 150.00
	Each bird so possessed	25.00
	Whoever, in violation of the Migratory Bird Treaty Act, shall: (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter, or offer to barter such bird, or (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both. (16 USC § 707(b))	MANDATORY
MIGRATORY GAME BIRDS:		
20.21(a)	Take migratory birds with illegal device or substance	100.00
20.21(b)	Take migratory game birds with shotgun capable of holding more than three shells:	
	Unplugged	100.00
	Improperly plugged	50.00
20.21(c)-(h)	Take migratory game birds from or with use of unlawful means, such as, but not limited to, sinkboxes, motor vehicles, motor boats, live birds as decoys, electrically amplified bird calls	100.00
20.21(i)	Take migratory game birds by the aid of bait, or on or over baited area	200.00
20.21(j)	Take migratory game birds with other than steel shot in noted nontoxic shot zone area	25.00
	Miscellaneous regulations adopted for special areas or conditions	50.00
20.22	Taking migratory game birds in closed season	150.00
	Each bird so taken	25.00
20.23	Taking migratory game birds before of [or] after hours open to shooting	100.00
20.24 & 20.33-20.35	Exceeding daily bag or possession limit	100.00
	Each bird in excess of limit	25.00
20.25	Failure to retrieve killed or crippled birds	100.00
	Each bird not retrieved	25.00
20.31	Possessing migratory game birds taken in violation of sections 20.21-20.25	100.00
20.32	Possessing freshly killed migratory game birds during closed season	150.00
	Each bird so possessed	25.00
20.36	Failure to tag migratory game birds as required by regulation	50.00
20.37	Receiving or having custody of untagged migratory game birds belonging to another	50.00
	Each bird	25.00
20.38	Possession of live migratory game birds while hunting or transporting wounded migratory game birds	100.00
	Each bird	25.00
20.41	Transporting migratory game birds illegally taken	100.00
20.43	Transporting migratory game birds with species ID removed	50.00
20.44	Mismarking or nonmarking packages or containers in transporting migratory game birds in U.S.	50.00
20.51	Exporting migratory game birds taken in violation of regulations	50.00
20.52	Exporting migratory game birds with species ID removed	50.00

CFR Section Number	*Offense*	*Collateral*
MIGRATORY BIRD TREATY ACT (16 USC § 703):		
20.53	Mismarking or nonmarking packages or containers in exporting migratory game birds	$ 50.00
20.61	Importing migratory game birds in excess of applicable limits	50.00
20.64	Importing, possessing, or transporting migratory game birds without export permits or other required documentation	50.00
20.72	Taking, possessing, transporting, or exporting migratory game birds in violation of State law	50.00
20.73	Importing, possessing, or transporting migratory bird taken, bought, sold, transported, possessed, or exported contrary to foreign law	50.00
20.81	Migratory bird preservation facility receiving or having custody of any migratory game birds not tagged as required	50.00
20.82	Violation of record keeping requirements by migratory bird preservation facility	50.00
20.83	Migratory preservation facility preventing authorized person to inspect premises	50.00
20.91	Violation of regulations regarding commercial use of feathers	100.00
MIGRATORY BIRD PERMITS:		
21.11	Violation of general permit requirements (all permits)	50.00
MIGRATORY BIRD HUNTING STAMP ACT (16 USC §§ 718a & 718e):		
71.2(b)	Taking migratory waterfowl without valid federal migratory bird hunting stamp (commonly called Duck Stamp) and related violations	25.00
NATIONAL WILDLIFE REFUGE SYSTEM ADMINISTRATION ACT (16 USC § 668dd—50 CFR §§ 26, 27, 28, 32 & 33):		
25.42	Failure to exhibit required permits on request	25.00
26.21	Trespassing on NWR	25.00
27.21	Illegally taking plants and/or animals on NWR	200.00
27.31	Violations of the general provisions regarding vehicle regulation	50.00
27.31(b)	Operating a motor vehicle under the influence of intoxicants or drugs	MANDATORY
27.31(c)	Operating motor vehicle carelessly or heedlessly	MANDATORY
27.32	Violations of the general provisions regarding boats	25.00
27.32(b)(3)	Operating a boat under the influence of intoxicants or drugs	MANDATORY
27.33	Violations of the general provisions regarding water skiing	25.00
27.34	Unauthorized operation of aircraft at low altitudes, harassing wildlife, or unauthorized landing on or taking off from NWR, except in an emergency	100.00
27.41	Carrying, possessing, or discharging firearms, fireworks, or explosives on NWR unless specifically authorized	100.00
27.43	Unauthorized use or possession of weapons other than firearms, i.e., crossbows, bows and arrows, etc., on NWR	25.00
27.51	Disturbing, injuring, and damaging plants or animals:	
	Minor	25.00
	Major	MANDATORY
27.52	Introduction of plant or animal life taken elsewhere into wildlife refuge area	MANDATORY
27.61	Destroying, injuring, defacing, disturbing, or unauthorized removal of public or private property	100.00
27.62	Unauthorized searching for and removing objects of antiquity	25.00
27.63	Unauthorized searching for and removing other valued objects	50.00
27.64	Prospecting, locating, or filing mining claims (minor)	50.00
	Prospecting for mineral deposits, filing mining claims, or removal of materials without authorization (major)	MANDATORY

Migratory Bird Treaty Act (16 USC § 703):

CFR Section Number	*Offense*	*Collateral*
27.65	Unauthorized tampering with, entering, or starting, or attempting to tamper with, enter, or start any motor vehicle, boat, equipment, or machinery	$ 100.00
27.71	Unauthorized taking or filming any motion or sound pictures for commercial use	100.00
27.72	Operation of audio devices as to cause disturbance	25.00
27.73	Using artificial light for purpose of spotting, locating, or taking animal	25.00
27.81	Entering or remaining in any NWR under the influence of alcohol	100.00
27.82(b)(1, 2)	Delivery or possession of controlled substance, except as authorized by law	MANDATORY
27.82(b)(3)	Being present in a NWR area while under the influence of a controlled substance	MANDATORY
27.83	Any act of indecency or disorderly conduct	100.00
27.84	Disturbing, molesting, or interfering with any person engaged in an authorized activity on any NWR	100.00
	Disturbing, molesting, or interfering with employee of United States or State government engaged in official business	MANDATORY
27.85	Gambling or operating gambling devices:	
	Minor	50.00
	Major	MANDATORY
27.86	Begging or unauthorized soliciting of funds	25.00
27.91	Unauthorized conducting or operation of field trials for dogs	25.00
27.92	Unauthorized constructing, installing, occupying, or maintaining any building or other structure	50.00
	Constructing building, other structures, or obstructions on NWR area (major)	MANDATORY
27.93	Abandoning, discarding, or leaving personal property	25.00
27.94	Littering or improperly disposing of garbage or wastes	50.00
27.95	Unauthorized setting or causing a fire, including camp and cook fires	25.00
27.95(a)	Setting on fire timber, brush, grass, without authorization	MANDATORY
27.96	Unauthorized advertising	75.00
27.97	Soliciting business or conducting a commercial enterprise except as authorized by special permit	50.00
28.31	All other violations of the provisions, rules, regulations, posted signs, or special regulations covering the National Wildlife Refuge System, or any items, conditions or restrictions in a permit, license, grant, privilege, or any other limitation established as to the National Wildlife Refuge System	50.00
32.2	Violation of the general provisions regarding special public hunting on NWR	50.00
	Violation of the general provisions regarding public sport fishing on NWR	50.00
32.2(g)	Use of any drug on an arrow for bow hunting, or possession of arrows employing such drugs, on any NWR	MANDATORY

Lacey Act (16 USC §§ 3371-3377):

16 USC Section		
3372(a)(1) & 3373(d)(2)	Importing, exporting, transporting, selling, receiving, acquiring, or purchasing any fish or wildlife or plant taken or possessed in violation of law, treaty, or regulation of the United States or Indian Tribal Law	250.00
	Each specimen	50.00
3372(a)(2) & 3373(d)(2)	Importing, exporting, transporting, selling, receiving, acquiring, or purchasing in interstate commerce any fish or wildlife taken or possessed in violation of State law	250.00

16 USC Section		
	Each specimen	$ 50.00

MANAGEMENT OF FISHERIES CONSERVATION AREA NATIONAL FISH HATCHERIES (16 USC §§ 742a, et seq.)

CFR Section Number	*Offense*	*Collateral*
70.4(b)	Unlawful taking of fish or other aquatic animals	$ 100.00
70.4(c)	Hunting, taking, or attempting to take or hunt any animal	100.00
70.4(d)	Disturbing spawning fish	100.00
71.2(d)	Violation of applicable State laws governing area of national hatchery	25.00
71.2(e)	Failure to comply with terms and conditions of access	25.00
71.2(f)	Failure to comply with special notices governing hunting	25.00
71.12(c)	Failure to comply with applicable provisions of federal law and other regulations on national fish hatchery area	25.00
	All pleas of not guilty	MANDATORY
	All felonies	MANDATORY
	Defendant charged with more than one violation	MANDATORY

IV.

CHEROKEE INDIAN RESERVATION
THE EASTERN BAND OF CHEROKEE INDIANS
QUALLA BOUNDARY

Title 18, United States Code
Section 1165 — Hunting, trapping, fishing on Indian land
[Maximum possible penalty for each charge — $200 fine, or 90 days' imprisonment, or both]

FISHING:

Number	*Offense*	*Collateral*
1.	Exceeding creel limit	$ 50.00
2.	Each fish in excess of creel limit	20.00
3.	Fishing without a permit	50.00
4.	Snagging of fish	50.00
5.	Grabbing of fish	50.00
6.	Chumming of fish	50.00
7.	Fishing with more than one line	50.00
8.	Setting of trotline	100.00
9.	Indian aiding and abetting principal in above offenses shall post similar collateral	
10.	Fishing in a closed stream	25.00
11.	Fishing before or after legal fishing hours	50.00
12.	Failure to keep individual's catch separate	25.00
13.	Winter Fishing Program (Nov. 1 — last day of Feb.):	
	(a) Use of bait other than artificial	50.00
	(b) Keeping fish under minimum (12") size	50.00
14.	Seining of fish	MANDATORY
15.	Buying or selling of game fish	MANDATORY
16.	Gigging or spearing fish	MANDATORY
17.	Dynamiting or poisoning of fish	MANDATORY
18.	Destruction of fish in Tribal holding facilities	MANDATORY
19.	Fishing in closing ponds posted "No Fishing" or "No Trespassing"	MANDATORY
20.	Destruction and damaging of Tribal holding facilities	MANDATORY

HUNTING:

1.	Non-Indian hunting on Reservation	200.00

Number	*Offense*	*Collateral*
2.	Indian aiding and abetting a non-Indian hunting on the Reservation	$ 200.00
3.	Small game violations:	
	(a) Excess bag limit	25.00
	(b) Each animal over bag limit	10.00
4.	Big game violations (bear and deer)	100.00
TRAPPING:		
1.	Non-Indian trapping on the Reservation	200.00
2.	Indian aiding and abetting a non-Indian trapping on the Reservation	200.00
Section 1164	Destroying boundary or warning signs (MPP: $250/6 months/both)	MANDATORY

Traffic offenses upon North Carolina highways traversing the Cherokee Indian Reservation (Bureau of Indian Affairs roads excluded) to which North Carolina motor vehicle laws are applicable:

	Collateral
A. SPEEDING VIOLATIONS:	
1. 1-5 m.p.h. over applicable limit	$ 15.00
2. 6-10 m.p.h. over applicable limit	20.00
3. 11-15 m.p.h. over applicable limit	25.00
4. 16-20 m.p.h. over applicable limit	35.00
B. OTHER VIOLATIONS:	
Driving without, or with expired, operator's or chauffeur's license (except when revoked or suspended), or knowingly permitting an owned vehicle to be so operated	40.00
Driving the wrong way on a dual-lane highway	40.00
Litterbugging	30.00
Improper passing	25.00
Failure to dim lights	10.00
Height and width violations	25.00
Illegal transportation of one (1) quart or less tax paid alcoholic beverage with seal broken in passenger area of motor vehicle	25.00
Driving too slowly	20.00
Any parking violation	15.00
Exceeding a safe speed	15.00
Following too closely	15.00
Failure to stop for red light or stop sign	15.00
Failure to yield right-of-way	15.00
Improper turn and/or improper signal	15.00
Driving wrong way on a one-way city street	15.00
Violation of the vehicle registration laws, except involving stolen or altered registration plates or certificates	15.00
Any other traffic violation for which court appearance is not mandatory	15.00

MANDATORY APPEARANCE VIOLATIONS

All pleas of not guilty
All felonies
Any violation resulting in personal injury
Defendant charged with more than one violation (other than multiple collateral fishing violations)
Driving under the influence of intoxicants or drugs
Exceeding applicable speed limit by over 21 mph
Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged racing)
Passing stopped school bus, school activity bus, or church bus
Failure to yield right-of-way to emergency vehicles
Failure to obey directions of a traffic officer or of a fireman at the scene of a fire
Illegal transportation of liquor (more than one quart)
Leaving scene of an accident in which involved, or failing to report such an accident
Driving while license suspended or revoked, or permitting an owned vehicle to be so operated

Driving with a false, forged, or altered driver's license, or permitting an owned vehicle to be so operated

Any violation of the financial responsibility laws

Any violation of the vehicle registration laws involving stolen or altered registration plates or certificates

Any violation involving a false affidavit, or false statement under oath, or perjury

V.

WATER RESOURCE DEVELOPMENT PROJECT REGULATIONS VIOLATIONS APPLICABLE TO W. KERR SCOTT DAM AND RESERVOIR

CORPS OF ENGINEERS
16 U.S.C. § 460(d)

Part 327, Title 36, Chapter III, Code of Federal Regulations

[Maximum possible penalty for each charge — $500 fine, or six months' imprisonment, or both]

Section Number	*Offense*	*Collateral*
327.1(d)	Discrimination by lessee, licensee, or concessionaire	MANDATORY
327.2(b)	Parking in violation of posted restrictions, or endangering property or environmental features	$ 15.00
327.2(c)	Unauthorized operation of a vehicle off roadways	25.00
327.2(d)	Failure to operate vehicle in accordance with posted regulations	25.00
327.2(e)	Operation of vehicle in careless, negligent or reckless manner, endangering property or environmental features	25.00
327.2(f)	Unauthorized operation of vehicle at developed areas for other than ingress or egress	15.00
327.2(g)	Unauthorized operation of vehicle without proper and effective muffler	25.00
327.3(a)	Unauthorized placement or operation of vessel for fee	50.00
327.3(b)	Operation of vessel in prohibited area	25.00
327.3(c)	Operation of watercraft in careless, negligent or reckless manner, endangering property or person	MANDATORY
327.3(d)	Use of vessel without U.S. Coast Guard required safety equipment	25.00
327.3(e)	Unauthorized use of vessel or other watercraft as place of habitation or residence	25.00
327.3(f)	Use of water skis in restricted areas, or in a careless, negligent or reckless manner, endangering property or person	25.00
327.3(g)	Failure to remove or securely moor vessel not in use or unauthorized placing of mooring facility or interference with navigational aid	25.00
327.3(h)	Use of vessel not constructed or maintained in compliance with National Safe Boating Act of 1971	25.00
327.3(i)	Discharge of sewage, galley waste, garbage, refuse, metal cans, or pollutants into project waters from vessel or watercraft	50.00
327.3(j)	Unauthorized operation of vessel or watercraft without proper and effective muffler	25.00
327.4(a)	Operation of aircraft in other than designated landing areas	MANDATORY
327.4(b)	(2) Operation of seaplane contrary to prohibitions or restrictions	MANDATORY
	(3) Operation of seaplane in violation of marine rules of the road for power boats or vessels	MANDATORY
	(4) Failure to moor securely seaplane at permitted mooring facilities and locations	MANDATORY
	(5) Unauthorized commercial operation of seaplane	MANDATORY
	(6) Operation of seaplane in a careless, negligent or reckless manner, endangering person or property	MANDATORY
327.4(d)	Unauthorized air delivery onto project lands or water	MANDATORY
327.5	Swimming, diving, snorkling or scuba diving at launching site or at designated no swimming areas	15.00

Section Number	*Offense*	*Collateral*
327.6(a)	Picnicking in prohibited area	$ 15.00
327.6(b)	Failure to keep picnic site free of trash and litter, or failure to remove personal equipment or to clean site upon departure	25.00
327.7(a)	Camping in area not designated for camping	25.00
327.7(b)	Camping more than 14 consecutive days without permission	25.00
327.7(c)	Unauthorized placing of camping equipment on or intermittent personal appearance at a campsite to reserve for future use	25.00
327.7(d)	Unauthorized digging ground or construction of structures	25.00
327.7(e)	Failure to keep campsite free of trash and litter or to remove personal equipment or clean campsite upon departure	25.00
327.8	Hunting, fishing, or trapping in designated area	25.00
327.9(a)	Improper disposal of waste material or liquid generated on the project	25.00
327.9(b)	Improper use of refuse facilities	25.00
327.9(c)	Unauthorized bringing of material onto project for the purpose of disposal	50.00
327.10(a)	Unauthorized carrying onto project or storage of gasoline and other fuels	25.00
327.10(b)	Failure to confine fires to designated areas and facilities, or properly to attend and extinguish	15.00
327.10(c)	Unauthorized gathering of wood	25.00
327.11(a)	Unauthorized bringing or allowing livestock in recreation areas	25.00
327.11(b)	Bringing unrestrained pets into developed recreation areas or having animals in swimming beach areas	15.00
327.11(c)	Allowing unauthorized livestock to enter or be upon project lands and failing to remove when requested	50.00
327.12(a)	Failure to observe posted visiting hours closure or restrictions	25.00
327.12(b)	Making excessive, disturbing noise between 10 p.m. and 6 a.m.	25.00
327.12(c)	Operation or use of annoying or endangering noise producing device	25.00
327.13(a)	Unauthorized possession of loaded firearm, loaded projectile firing devices and explosives	50.00
327.13(b)	Unauthorized possession or use of fireworks	15.00
327.14	Unauthorized destruction, injury, defacement, removal, or alternation of public property:	
	Damage — $-0- to $25.00	25.00
	$25.00 to $50.00	50.00
	Over $50.00	MANDATORY
327.15(a)	Abandonment of personal property	25.00
327.17	Unauthorized advertising	25.00
327.18	Unauthorized engaging in or solicitation of business	50.00
327.19(a)	Refusing or failing to comply with terms or conditions of permit	50.00
327.20	Unauthorized construction, placing, or continued existence of structures within project area	50.00
327.21(a)	Unauthorized conducting of special events	50.00
327.22(a)	Unauthorized occupation of lands, buildings, vessels, or other facilities for purpose of maintaining a residence	50.00
327.22(b)	Unauthorized ranging, grazing, or watering livestock	50.00
327.25(i)	Failure to pay authorized recreation use fee	25.00
327.26	Interference with government employee in conduct of official duties or failure to comply with lawful order	MANDATORY
	All pleas of not guilty	MANDATORY
	All felonies	MANDATORY
	Defendant charged with more than one violation	MANDATORY

VI.

VETERANS ADMINISTRATION FACILITIES VIOLATIONS

Part I, Title 38, Sections 1.218 and 1.219, Code of Federal Regulations

[Maximum possible penalty for each charge — $50 fine, or 30 days' imprisonment, or both]

Section Number	*Offense*	*Collateral*
1.218(b)	Entry upon, or failure to leave, closed premises by unauthorized persons	$ 15.00
1.218(c)	Littering, willful damage to or destruction or unauthorized removal of government property from VA premises or national cemeteries causing loss to government not exceeding $50	25.00
	Willful destruction, damage, or unauthorized removal of government property from VA premises or national cemeteries causing loss to government of $50 or more	MANDATORY
1.218(d)	Refusal to comply with prohibitory signs or directions of officials during emergencies	15.00
1.218(e)	Conduct on property which: creates loud or unusual noise; unreasonably obstructs usual use of entrances, foyers, etc.; impedes or disrupts official performance of government employees; prevents one from obtaining medical or other services; or use of loud, abusive, or otherwise improper language; or unwarranted loitering, sleeping, or assembly	25.00
	Failure to leave premises when so ordered as a result of creating disturbances	25.00
1.218(f)	Gambling, conducting lottery, selling or purchasing numbers tickets	25.00
1.218(g)(1)	Careless and reckless driving; operating motor vehicle under the influence of alcohol or drugs; unauthorized use or possession of alcohol or drugs (not prescribed for use as medicine)	MANDATORY
1.218(h)	Unauthorized soliciting, vending, commercial advertising, and collecting private debts	15.00
1.218(i)	Unauthorized distribution of advertising material	15.00
1.218(j)	Unauthorized photography; photography for commercial purposes	15.00
1.218(k)	Bringing animals (except seeing-eye dogs) onto VA property without authorization	15.00
1.218(l)	Parking in or blocking emergency vehicle spaces or entrances; blocking access to fire hydrants or spaces reserved for physically disabled persons	25.00
	Failure to comply with traffic signals and directions or posted signs; blocking entrances, driveways, walks, or loading platforms, creating excessive noise	15.00
	Unauthorized parking in reserved locations, parking in excess of posted time limits	15.00
1.218(n)	Conducting unauthorized service, ceremony, or demonstration	15.00
	All pleas of not guilty	MANDATORY
	All felonies (Assimilated Crimes Act, 18 U.S.C. § 13)	MANDATORY
	Defendant charged with more than one violation	MANDATORY

VII.

GENERAL SERVICES ADMINISTRATION VIOLATIONS

Title 41, Chapter 101, Code of Federal Regulations

[Maximum possible penalty for each charge — $50.00 fine, or 30 days' imprisonment, or both]

Section Number	*Offense*	*Collateral*
20.302	Failure to record presence on federal property outside normal working hours and/or display identification upon request of authorized personnel	$ 25.00
20.303	Littering, disposing of rubbish, on federal property	15.00
20.303	Willful destruction, damage, or removal of federal property or creating hazard to persons thereon	MANDATORY
20.304	Failure to comply with official signs and with directions of authorized officials	25.00
20.305	Disorderly conduct; obstructing use of facilities; impeding or disrupting performance of official duties by government employees	25.00
20.306	Gambling; conducting lottery or pool; selling or buying lottery tickets	25.00
20.307	Operating a motor vehicle while under the influence of alcohol or drugs; entering upon federal property while under the influence of alcohol or drugs; use of drugs or alcoholic beverage	MANDATORY
20.308	Soliciting; collecting private debts; unauthorized commercial advertising; and vending	25.00
20.309	Unauthorized distribution of handbills, pamphlets, etc.; displaying of placards or posting of material on bulletin boards or elsewhere	15.00
20.310	Unauthorized taking of photographs for news, advertising, or commercial purposes	15.00
20.311	Bringing animals (except seeing-eye dogs) on premises for unofficial purposes	15.00
20.312	Vehicular and pedestrian traffic — failure to comply with signals and directions; blocking entrances, driveways, etc.; unauthorized parking	15.00
20.313	Carrying firearms, dangerous or deadly weapons or explosives, openly or concealed, except for official purposes	MANDATORY
20.314	Discrimination by segregation or otherwise on the basis of race, creed, color, sex, or national origin in furnishing or refusing facilities of a public nature	MANDATORY
	All pleas of not guilty	MANDATORY
	All felonies	MANDATORY
	Defendant charged with more than one violation	MANDATORY

(Amended June 1, 1977; March 6, 1979; May 10, 1982; December 19, 1983.)

Editor's Note. — This rule, effective by order of December 19, 1983, supersedes orders dated January 1, 1981 and June 1, 1982.

Rule 13. Sessions of Grand Jury.

(1) Grand juries shall be convened in Charlotte on the first Monday in February, April, June, August, October, and December; in Asheville on the first Monday in January, March, May, July, September, and November. For the convenience of jurors, witnesses and court personnel, the grand jury convened in Charlotte shall generally pass upon indictments for the Charlotte and Statesville Divisions and shall be composed of members drawn from both

Divisions; the grand jury convened in Asheville shall generally pass upon indictments for the Asheville, Bryson City, and Shelby Divisions and shall be composed of members drawn from those Divisions.

(2) All grand juries shall consist of nineteen (19) members, who shall serve for a 12-month period, and shall have authority to pass upon indictments for all crimes committed within this district regardless of the Division in which such juries may sit. (Adopted October 31, 1975.)

Rule 14. Additional Duties of Magistrates.

In accordance with Rule 83, Federal Rules of Civil Procedure, and Rule 57, Federal Rules of Criminal Procedure, and specifically, pursuant to the provisions of 28 U. S. C. § 636(b), the following additional duties are hereby specified for the United States Magistrates for the Western District of North Carolina, when directed by the Court: Conduct post-indictment arraignments, and ordering a pre-sentence report on a defendant who signifies the desire to plead guilty.

In accordance with Rule 57, Federal Rules of Criminal Procedure, and specifically, pursuant to the provisions of 28 U.S.C., § 636(b), the following additional duty is hereby specified for the United States Magistrates, United States District Court, Western District of North Carolina: Receive true bills of indictment returned by the grand jury in open court and receive reports of no true bills from the foreman of the grand jury in writing, pursuant to Rule 6(f), Federal Rules of Criminal Procedure, as amended August 1, 1976. (Adopted October 31, 1975; September 23, 1976.)

Rule 15. Rule for Custody and Disposition of Models, Exhibits, and Depositions.

Custody

All models, diagrams, exhibits, depositions and other material admitted in evidence or filed in any cause shall be placed in the custody of the clerk, unless otherwise ordered by the court.

Removal

All models, diagrams, exhibits, depositions, or other material placed in the custody of the clerk shall be removed by the party offering such evidence, or filing such materials, within 30 days after the expiration of the time for appeal from final judgment, unless otherwise directed by the Court. At the time of removal, a detailed record of the disposition shall be filed in the case jacket.

If the party offering, or filing, models, diagrams, exhibits, depositions or other material fails to remove such materials as provided herein, the clerk shall write the attorney of record, of [or] if none, the party offering the evidence, calling attention to the provisions of this rule. If after the mailing of such notice the materials have not been removed within 30 days, they may be destroyed by the clerk. (Adopted July 22, 1977.)

Rule 16. Discovery Materials Not to Be Filed Unless Ordered or Needed.

Depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto are not to be filed unless on order of the Court or for use in the proceeding. All such papers must be served on other counsel or parties entitled to service of papers filed with the Clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered. (Added January 1, 1983.)

II. Bankruptcy Rules

Local Rule Referencing All Bankruptcy Matters to the Bankruptcy Judge and Providing for Bankruptcy Court Clerk.

(a) Bankruptcy Resolution. The purpose of this Rule is to convey to the bankruptcy judge of this district authority to act in bankruptcy matters and to provide for the bankruptcy court clerk under and in accord with the provisions of the "Bankruptcy Amendments and Federal Judgeship Act of 1984", and in the light and after consideration of Memoranda of the Administrative Office of the United States Courts dated June 28, 1984, July 20, 1984, and July 11, 1984.

The judges of the district court find and conclude that it is the clear intent of Congress to refer bankruptcy matters to bankruptcy judges, that the judge, clerk, and their staff have the specialized expertise necessary for the determination and handling of bankruptcy matters, all of which is in place for the continuation of the appropriate handling of the existing bankruptcy caseload, administratively and otherwise; and that the bankruptcy judge has this date certified to the Judicial Council of the Fourth Circuit and to the Director of the Administrative Office of the United States Court that the number of cases and proceedings pending within the jurisdiction under section 1334 of the "Bankruptcy Amendments and Federal Judgeship Act of 1984" within this judicial district warrants the appointment by the bankruptcy judge of an individual to serve as Clerk of such bankruptcy court.

Therefore, pursuant to the provisions of the "Bankruptcy Amendments and Federal Judgeship Act of 1984", the orderly conduct of the business of the court in the handling of bankruptcy matters requires this referral to the bankruptcy judge.

(b) Reference to the Bankruptcy Judge is hereby made of:

(1) All cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11, subject to the reference exception and powers of the Bankruptcy Judge as set out in the provisions of the "Bankruptcy Amendments and Judgeship Act of 1984."

(2) All proceedings that are not core proceedings but that are otherwise related to a case under Title 11, subject to the reference exception and powers of the Bankruptcy Judge as set out in the provisions of the "Bankruptcy Amendments and Judgeship Act of 1984."

(c) Clerk of Court.

(1) The bankruptcy judge having certified the need for a bankruptcy clerk as provided for in Section 156 of the Act, all functions of the "clerk" as provided by law are hereby referenced to the bankruptcy clerk appointed by the bankruptcy judge.

(d) Effective Date and Pending Cases. The rule shall become effective immediately, and shall apply to all cases governed by the Bankruptcy Act of 1898, and the Bankruptcy Code of 1978 as amended. Any bankruptcy pending before the bankruptcy judge on the effective date of this Rule shall be deemed referred to that judge. All bankruptcy matters filed on and after the effective date of this Rule shall be deemed automatically referred to that judge. (Added July 30, 1984.)

APPENDIX OF FORMS

Form 1

(See Local Rule 7)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

.... DIVISION

	Plaintiff,	Civil No. ....
-vs-		
	Defendant.	Pre-Trial Order

1. Unless typed in below, there are no further amendments to be made to the pleadings nor any motions which have not been ruled on.
2. Unless typed in below, all discovery procedures (including medical examinations) have been completed or will be completed by the .... day of ...., 1965. The case is ready for trial before the Court .... a jury and will be calendared for trial at the .... Term, 1965. The duration of trial will be approximately .... days.
3. The Court requires that counsel permit each other to inspect all exhibits *before* the trial begins. Also before the trial begins, counsel will number all exhibits and make a *list* of them, and give to the courtroom Clerk three copies of the list when the case is called for trial. Usually it is a waste of time and money to bring custodians of records and documents to court for authentication. Counsel are requested to discuss authenticity of exhibits at least one week before trial so as to allow time for the party opposing the introduction of such exhibits to determine authenticity if it is seriously contested.
4. At least one week before trial the Court requests that counsel for plaintiff telephone or otherwise communicate with counsel for defendant and that both counsel seriously consider at that time the possibility of any settlement agreement.

Comment: Blanks in the foregoing paragraphs are filled in at pre-trial conference. The remainder of the pre-trial order is dictated by the judge in the presence of counsel at pre-trial conference.

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RULES OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Adopted June 15, 1984.

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GENERAL PROVISIONS (1-14)

RULE NO. 1

PERSONS WHO MAY PRACTICE BEFORE THE BANKRUPTCY COURT

(a) Those persons who are admitted to practice before the United States District Court for the Western District of North Carolina will be allowed to practice law before this Court. For purposes of this Rule, "practice of law" includes, but is not limited to, preparing complaints, preparing petitions, preparing applications, preparing motions, questioning witnesses in proceedings before the Judge, and pursuing any action of any nature in this Court (but does not include questioning debtors at a meeting of creditors or at other administrative hearings). All businesses, (other than a sole proprietorship), partnerships, and corporations that desire to appear in proceedings before this court must be represented by a lawyer duly admitted to practice before this court. Otherwise licensed attorneys may be permitted by the Court to appear on an ad hoc basis.

The following exceptions shall apply:

1. An individual may represent himself.
2. An individual may represent a non-incorporated business if said individual is the sole proprietor of said business.
3. An individual may represent himself or any other entity at a meeting of creditors; however, any objection, motion, or application that must be formally pursued before the Court, although raised at a meeting of creditors, must be pursued by an attorney permitted to practice before this Court.

RULE NO. 2

REQUIRED MATRIX AND NUMBER OF COPIES OF PETITION AND OTHER DOCUMENTS

I. Required number of copies of petitions and attached lists, schedules, statements, claims of exemption and subsequent amendments thereto:
  (a) Chapter 7 or Chapter 13: The original document plus three copies
  (b) Chapter 9 or Chapter 11: The original document plus five copies.
II. Monthly Financial Reports for Debtors and Operating Trustees
  (a) The original document plus two copies must be filed.
III. Copies stamped FILED
  (a) Any person requesting filed copies of documents for their office records must submit copies in addition to those required in I and II above along with a stamped, self-addressed envelope.
IV. Requirement of Master Mailing Matrix
  (a) As a requirement of filing, all bankruptcy petitions must be accompanied by an alphabetized matrix containing the names and addresses of all parties in interest, including the debtor, debtor's attorney, creditors and appropriate governmental agencies.

(b) The matrix shall be prepared according to the forms and instructions provided upon request by the Clerk's office.

(c) The matrix shall be certified as clerically accurate by the filing attorney or party and such party shall be responsible for any errors in or omissions from the listings.

(d) In Chapter 13 cases, creditors or contingent creditors to whom notice is intended to be sent must be listed on the Schedule of Creditors as well as on the matrix.

RULE NO. 3

REQUIRED NUMBER OF COPIES OF ORDERS OR JUDGMENTS TENDERED TO THE COURT

Any order or judgment that is tendered to the Court for consideration shall have attached a sufficient number of copies for service on all parties required to receive notice of such order or judgment. Orders tendered without sufficient copies will not be considered until such time as the required copies are also tendered.

RULE NO. 4

EXTENT OF AN ATTORNEY'S DUTY TO REPRESENT

Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the responsible attorney of record for all purposes including the representation of the debtor in all matters that arise in conjunction with the proceeding until the case is closed or the attorney is relieved upon application and Court order. In the event additional fees are required, they will be applied for in accordance with Rule 2016.

RULE NO. 5

RETENTION OF TAPES OF 341(A) MEETING FOR SIX MONTHS AND REQUESTS FOR TRANSCRIPTS OF TAPES

I. Retention of Tapes

(a) The Clerk shall retain and preserve the taped recordings of the meetings of creditors required by 341(a) of the Bankruptcy Code for a period of six (6) months from the date of said meeting. After the expiration of six (6) months from said date, the Clerk is authorized to erase or otherwise destroy the aforementioned taped recordings, unless otherwise ordered by the Court.

II. Transcripts of 341(a) Meeting Tapes.

(a) Any party wishing a transcript of a 341(a) meeting tape must contact the Contract Court Reporter for the Court and order the transcript. The ordering party must then contact the Clerk's Office and request that the Clerk deliver the tape to the Court Reporter for transcribing. All fees will be paid directly to the Court Reporter by the ordering party in accordance with the transcript fee schedule adopted by the Judicial Conference.

RULE NO. 6

ROUTING OF DOCUMENTS THROUGH CLERK'S OFFICE

All pleadings (including, but not limited to, complaints, answers, motions and applications), and all prepared orders, shall be tendered by the party submitting such document to the Clerk's Office, rather than directly to the Judge, and the Clerk's Office shall first accomplish any necessary processing of such document, before such document is forwarded to the Judge of this Court for consideration.

RULE NO. 7

REGISTRY ACCOUNTS

In the event that a depository intended by the Court to receive registry funds is not, immediately upon the Court's receipt of the registry funds, able to pledge sufficient collateral for receipt of those funds, such funds may be retained temporarily in non-interest-bearing U.S. Treasury accounts as necessary to arrange for their deposit in interest-bearing accounts.

RULE NO. 8

DESIGNATION OF PARTIES TO PROVIDE NOTICE

The Clerk of this Court is authorized to designate the parties who shall provide such notice to creditors and parties-in-interest as required under the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules of Court.

RULE NO. 9

BUSINESS HOURS OF THE COURT AND ACCESS TO COURT RECORDS

(A) Business Hours of the Court

The Business Hours of the Office of the Clerk of the United States Bankruptcy Court for the Western District of North Carolina will be from 8:30 A.M. to 4:30 P.M. all days except Saturday, Sunday and legal holidays.

(B) Court Records

All records of the Court shall remain in the custody of the Clerk, subject to examination by the public without charge. The Clerk may require a written receipt from parties reviewing a file. No record shall be taken from the Clerk's Office without an Order of the Court allowing such removal and no such Order shall issue except for good cause.

RULE NO. 10

PETITION AND ACCOMPANYING DOCUMENTS

(A) Style of Petition

The name of the debtor in the caption of a Petition shall be styled as follows if the debtor is an individual: "Thomas E. Jones, a single person," if the debtor is not married; or "Thomas E. Jones, married". If the debtor is a general partnership, the words "a general partnership" shall follow the name. If the debtor is a limited partnership, the words "a limited partnership" shall follow the name. If the debtor is a corporation, the words "a corporation" shall follow the name unless "Inc.," "Incorporated," or "Corporation" is part of the name.

(B) Other Names

Immediately after the debtor's name in the caption of the Petition, the petitioners shall list all names, assumed names, trade names, or designations by or under which the debtor has been known or conducted any business within the six (6) years preceding the filing of the Petition.

(C) Debtor Engaged in Business

Where any debts scheduled were incurred while the debtor was engaged in business, even though he is not so engaged at the time of filing of the Petition, the Statement of Affairs for a debtor engaged in business shall be filed.

(D) Petition Filed by a Corporation

When a Voluntary Petition is filed by a corporation, there shall be attached to the Petition as an Exhibit the original or a Certified Copy of the Resolution of the Petitioner's Board of Directors authorizing the filing of the Petition. The corporation shall be represented by an attorney and the attorney shall sign the Petition.

(E) Petition Filed by a Partnership

When a Voluntary Petition is filed by a partnership

(1) All general partners shall verify the petition; or

(2) At least one general partner shall verify the Petition. If fewer than all general partners verify the Petition, there shall be attached to the Petition as an Exhibit the original or a Certified Copy of a document evidencing the consent of all general partners to the Petition.

(F) Character of Assets and Liabilities

All assets and liabilities scheduled by married debtors shall be considered to be scheduled as joint in character unless the debtor indicates otherwise.

(G) No Blank Items

Each item in the Schedules and Statement of Affairs not otherwise filled out, shall be completed by the entry "none" or "not applicable," as appropriate.

(H) Refusal to File Petition

The Clerk need not accept for filing a Voluntary Petition which is not accompanied by a matrix, cover sheet, filing fee, and corporate or partnership resolution, as applicable. A Voluntary Chapter 11 Petition need not be accepted unless accompanied, in addition to the foregoing, by a list of the twenty (20) largest unsecured creditors. Acceptance of a Petition for filing does not operate as a waiver of any of the provisions of this rule.

RULE NO. 11

NEED OF ATTENTION OR PROTECTION

(A) Inventory or Equipment

When a stock of goods or business equipment is scheduled, the debtor shall, immediately after the general description thereof, list a present inventory, append a brief explanation of its exact location, the name and address of the custodian thereof, the protection being given such property, and the amount and duration of fire and theft insurance, if any, and state whether prompt additional attention or protection is necessary.

(B) Need for Immediate Action

If a stock of goods includes perishables or if property or the business premises otherwise need immediate attention or protection, the debtor or his attorney, when relief is ordered, shall so notify the Court and the Trustee, if one has been appointed, of the need for immediate action. Notification shall be by personal communication or by telephone.

RULE NO. 12

EXHIBITS

The Clerk may destroy upon notice or return all Exhibits to the parties offering them after the time for appeal has passed.

RULE NO. 13

ORDERS, FINDINGS, CONCLUSIONS

(A) Preparation

All orders, findings of fact and conclusions of law, judgments, and decrees, unless otherwise directed by the Court, and required to be in writing, and when not entered by the Clerk as provided in Rule 58, Federal Rules of Civil Procedure, shall be prepared by the attorney obtaining such order, judgment or decree, or representing the successful party. The original order, findings of fact and conclusions of law, judgment or decree shall be delivered to the Clerk after one (1) copy has been served on any party who opposed the order and any party (by their counsel, if they were represented) who participated in a hearing from which the order arose. A cover letter shall be attached to the tendered order in which the tendering attorney shall notify the Clerk of the date on which, and the parties on whom, such copies were served. The Court may then enter such order, findings and conclusions, judgment or decree and the opposing party, if not satisfied with the same, may move for amendment or alteration thereof or addition thereto in accordance with Rule 52(b) or 59(e), Federal Rules of Civil Procedure.

(B) Time of Presentation

Any party directed to prepare an order, findings of fact and conclusions of law, judgment or decree either by (A) above or by specific direction of the Court shall prepare and present such order to the Clerk within ten (10) days of the Court announcing its decision unless the party responsible for preparing such order has applied for and received from the Court a specific extension for cause.

(C) Every judgment or order in a contested matter or adversary proceeding shall be set forth on a separate document from the motion or other request for the order, and shall set forth with particularity the terms of the order.

(D) Signature of the Court

A document requiring the signature of the Court shall be prepared as follows:

DATED this ______________ day of ________________________, 19 ___

____

BANKRUPTCY JUDGE

RULE NO. 14

COSTS

(A) Cost Bill

A party allowed costs may, within ten (10) days after entry of judgment, file and serve on the attorney for the opposing party a bill of costs. (BK 97). The bill shall state the time that the costs thereon will be taxed, which time shall be no less than one day from the date the bill is served on the opposing party. With the bill shall be filed a certification that the opposing party was served.

(B) Objection and Hearing

Before the costs are taxed, a party objecting to any costs contained in the bill shall file his objection in writing specifying the ground of his objection. The Clerk of Court will hear the objection.

(C) Taxation

After the hearing, or, if no objection is filed, on the date stated in the cost bill, the Clerk may enter an order taxing the costs. The taxation of costs made by the Clerk shall be final unless modified on appeal as provided in subdivision (D).

(D) Appeal

A party may appeal the decision of the Clerk in the taxation of costs by filing a motion to retax with the Court within five (5) days of the taxation by the Clerk. The party appealing shall give notice and opportunity for a hearing to the opposing party. The motion will be heard upon the same papers and evidence used before the Clerk.

CHAPTER 7 PROVISIONS (15-19)

RULE NO. 15

TIME LIMIT FOR AMENDING OR OBJECTING TO EXEMPTION ELECTION

I. The debtor shall have up to and including the first day first set for the § 341(a) meeting of creditors in which to amend his exemption election, after which the exemption election shall be final as against the debtor; provided, however, that the trustee and any party in interest shall have up to and including the thirtieth (30th) day following the 341(a) meeting of creditors in which to object to the debtor's exemption election.

II. Any amendments or objections to exemption elections other than as allowed in (I.) shall be with leave of Court only.

RULE NO. 16

FILING OF ATTORNEY FEE DISCLOSURE STATEMENT

The disclosure of attorney compensation required by 11 U.S.C. Section 329 must be filed with the Court within fifteen (15) days of the date the original petition is filed.

Court Comment. — This supplements Rule 2016(b).

RULE NO. 17

FINAL HEARINGS ON REQUESTS FOR RELIEF FROM STAY

The first scheduled hearing on a request for relief from stay shall be deemed to be the final hearing and all parties are to be prepared for trial at such time unless either party notifies the opposite party and the Court at least 24 hours in advance of the hearing that they wish the hearing treated as a preliminary hearing. Should such occur, at the preliminary hearing, the date for final hearing shall be set.

Court Comment. — This supplements Rule 4001(b).

RULE NO. 18

CERTIFICATE OF SERVICE REQUIRED FOR AMENDMENT TO PETITIONS, SCHEDULES OR STATEMENTS AND CLAIM OF EXEMPTIONS

Any amendment to a petition, list, schedule or statement shall be accompanied by a certificate of service in the form of a statement of the date and manner of service and of the names and addresses of the persons served, certified by the person who made the service.

Court Comment. — This supplements Rule 1009.

RULE NO. 19

DUTY OF CHAPTER 7 TRUSTEE TO GIVE NOTICE

The Chapter 7 Trustees shall prepare and mail Notices as follows:

1) Notices of Sale as provided in Bankruptcy Rule 6004 and setting the time for filing objections to any sale to within at least fifteen (15) days of the date of the mailing of said Notice.
2) Notice of Hearing on the final account (final meeting) in a Chapter 7 case if the net proceeds realized exceed $250.00.

The Chapter 7 Trustee shall prepare and file with the Clerk a Certificate of Service showing when and to whom such Notices were mailed within three (3) days thereafter.

CHAPTER 11 PROVISIONS (20-22)

RULE NO. 20

CHAPTER 11 INTERIM FEE PROCEDURE

I. Establishment of Procedure
  (a) No application for interim compensation shall be considered by the Court unless the requirements of 11 U.S.C. Section 331 are met.

II. Dates of Hearing on Fee Applications
  (a) In cases venued in the Charlotte Division, fees will be considered on the last Thursday in April, July, October, and January at 9:30 A.M.
  (b) In cases venued in Asheville, Statesville, and Shelby, fees will be considered during the first *full* day of the Bankruptcy Court calendar in that Division at 9:30 A.M. in April, July, October, and January.
  (c) Fee applications are to be scheduled for hearing in the Division in which the case is venued unless the applying party has made application to the Court and been granted an order directing otherwise.

III. Service of Application and Notice of Hearing
- (a) In all cases, applications for interim fees will be served by the applying party on the debtor and the debtor's counsel.
- (b) In all cases in which there is a committee of equity security holders, or a committee of unsecured creditors or other court appointed committee, a copy of the application shall be served on the chairman of each such committee and on its counsel if such has been appointed, or otherwise on members who have accepted appointment to the creditors committee.
- (c) If a trustee has been appointed, a copy of the application shall be served on the trustee.
- (d) Copies of the application must be served on the required parties and filed with the Court along with a Certificate of Service twenty (20) days prior to the date on which the application is scheduled for hearing.
- (e) In addition to a copy of the application, the parties set out above together with any parties who have requested notices pursuant to Rule 2002(i) are to be served with notice of the time and place of the hearing, the identity of the applicant, the amount requested, their opportunity to be heard at said time, and their right to file specific written objections to the applied for fees with the Court prior to the hearing.
- (f) Four copies of the application must be filed with the Court.

RULE NO. 21

NOTICES REQUIRED TO BE SENT BY CHAPTER 11 DEBTORS

In Chapter 11 proceedings, the debtor in possession shall be responsible for mailing the following notices and documents to creditors, after having their form and content approved by the Clerk's Office, and for filing a Certificate of Mailing with the Clerk's Office within five (5) days of the date of the mailing:

1) notice of the meeting of creditors
2) notice of the hearing on disclosure statement
3) the plan
4) the disclosure statement
5) notice regarding balloting and date for hearing on confirmation
6) order of confirmation
7) any other notices as the Court or Clerk shall direct in a particular proceeding.

RULE NO. 22

CHAPTER 11 CLAIMS

In a Chapter 11 case, a proof of claim (if required to be filed) shall be filed within ninety (90) days after the date first set for the meeting of creditors called pursuant to § 341(a) of the Bankruptcy Code, except as otherwise specified.

Court Comment. — This supplements Rule 303(c)(3).

CHAPTER 13 PROVISIONS (23-31)

RULE NO. 23

REQUIREMENTS FOR PAYMENT OF FILING FEES IN INSTALLMENTS

I. No petition on behalf of an individual shall be accepted for filing by the Clerk unless it is accompanied by full payment of the filing fee or a properly completed application to pay fees in installments.
  a) To be deemed complete the application must
    1) Set out why the debtor cannot pay the full fee at the time of filing.
    2) Set out a payment schedule that complies with the requirements of Rule 1006(b)(2).
    3) Contain a statement that the debtor's attorney has received no payment for fees and will accept none until the filing fees are paid in full.
    4) Contain a statement that the debtor does not owe any outstanding fees to the Court on account of any other prior proceeding.
    5) Be signed by both the debtor and the debtor's attorney.

II. Action on Application
  a) Following the filing of a petition and application, each application will be reviewed by the Court and an order entered granting or denying the application. Should the application be denied, the debtor shall have ten (10) days from the date of the order to pay the full fee. If the full fee is not paid within ten (10) days of the order, the petition will be dismissed by the Court without any further prior notice.

III. Action upon Failure to Make Payments
  a) The debtor and the debtor's attorney are responsible for knowing the date payments are due. The Clerk's office will not send reminders or notices.
  b) Upon the failure to make any payment as scheduled, the petition is subject to dismissal after hearing notice to the debtor and trustee. Under no circumstances shall the failure of the Court to dismiss for a missed or late payment be deemed to be acquiescence in or forgiveness of such action.
  c) In Chapter 13 proceedings filing fees must be paid directly to the Clerk and may not be paid through the Standing Trustee, whether the payments are in full or installments.

RULE NO. 24

PAYMENTS TO CREDITORS IN CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASES

Chapter 13 Standing Trustees are authorized to make payments to creditors in amounts smaller than $15 without waiting for that creditor's dividends to accumulate to $15. The decision as to whether to make smaller payments shall be made in each case by the Trustee and such decision shall be solely the Trustee's discretion as to the best administration of the individual estate.

RULE NO. 25

FILING OF CLAIMS IN CHAPTER 13 PROCEEDINGS

I. Filing Claims

  A. Proofs of claim in Chapter 13 proceedings shall be filed directly with the office of the Standing Trustee to whom the case is assigned. The address of the proper Standing Trustee will be shown on the notice of creditors meeting. Claims will be dated and stamped as received as of the date they arrive in the Trustee's office and the claim shall be deemed filed with the Court as of that date.

II. Claims Docket

  A. The staff of the Chapter 13 Trustee shall prepare a claims docket for each proceeding referred to that trustee and such claims docket shall be transferred to the Clerk's Office at the closing of the case along with the original claims and made a part of the permanent record.

RULE NO. 26

PROCEDURE FOR OBJECTING TO OR CONFIRMING CHAPTER 13 PLANS

I. Confirmation of Plans

  (a) It shall be the practice of this Court that following the 341(a) meeting of creditors, if the trustee recommends confirmation, the plan meets the requisite legal criteria, and there were no properly lodged objections to confirmation, an order of confirmation will be tendered to the Judge for consideration without further notice, unless an objection to confirmation is timely filed.

  (b) The plan will be confirmed as of the date of filing the order of confirmation. A supplemental order of confirmation which will not substantively change the plan but which will set out the various aspects of the plan with more particularity may subsequently be entered.

II. Objections to Confirmation

  (a) An objection to confirmation must be filed as a separate document in writing within five (5) days of the adjournment of the 341(b) meeting or it will not be considered by the Court.

(b) If an oral objection to confirmation is made at the 341(a) meeting, the objecting party must give in writing his name, address and phone number to the presiding officer who will note the objection on the memorandum of the meeting. Within five (5) days the objecting party must then file a formal written objection with the Court or a notice of withdrawal of objection. If neither is done, the objection will be rendered moot, and the case will continue as if no objection has been announced.

(c) All properly filed objections to confirmation shall be set for hearing by the Court upon proper notice. When a hearing is set on a properly lodged objection, the objecting creditor, the debtor and the debtor's attorney, and the trustee will be noticed.

III. The objecting party must serve a copy of the written objection on the debtor, the debtor's attorney and the trustee at the time of filing, and a voluntary withdrawal of an objection to confirmation must be filed and served in like manner.

RULE NO. 27

INCOME TAX REFUNDS

I. The Internal Revenue Service is authorized and directed to make income tax refunds, in the ordinary course of business, directly to debtors in Chapter 7 and 13 cases unless otherwise ordered by the Bankruptcy Court or otherwise instructed by the Trustee in Chapter 7 cases and the Standing Trustee in Chapter 13 cases.

II. The Internal Revenue Service is authorized to offset against any refund due a debtor any taxes due the United States Government.

III. The Internal Revenue Service is authorized to assess any tax liability satisfied by offsetting any refunds, when such liability has not previously been assessed.

IV. The Internal Revenue Service is authorized to assess tax liabilities shown on voluntarily filed returns and other agreed-to tax liabilities.

RULE NO. 28

SEARCH FEE CHARGED BY CHAPTER 13 TRUSTEE

The Standing Chapter 13 Trustees are authorized to charge a Two Dollar ($2.00) search fee when answering inquiries which require a search of the records for each case with respect to which the inquiry is made, to use as a part of their operating expenses. Said Trustees shall account to the Court for such funds so collected.

RULE NO. 29

TRUSTEE VALUATION OF CREDITOR'S SECURITY

After notice, a Chapter 13 Trustee may determine the value of a creditor's security at the § 341(a) creditors meeting, and unless an objection is filed within ten (10) days after notice of such valuation, the Court may accept the valuation for the purpose of distribution under the Plan.

Court Comment. — This supplements Rule 3012.

RULE NO. 30

SECURED CREDITOR CONTACT WITH CHAPTER 13 DEBTOR

In Chapter 13 cases, affected secured creditors may:

1. Inquire of the debtor directly about the status of insurance coverage on property used as collateral.
2. Contact the debtor to inquire about post-petition payments to be made outside the Plan directly to the creditor and on such payments the creditor may issue post-petition delinquency notices.
3. Provide information directly to the debtor upon inquiry relative to the status of the account including information as to interest paid.

RULE NO. 31

CHAPTER 13 ATTORNEY FEE PROCEDURE

I. Amount of Fee
  (a) There shall be a presumption that $500.00 is a fair fee for an attorney to charge for handling a Chapter 13 proceeding; however, attorneys are encouraged to negotiate a lesser fee with the client if actual time and materials would warrant.
  (b) Any fee over the presumptively fair $500.00 or additional fees that may be incurred over the life of the Chapter 13 proceeding must be applied for and approved by the Court after notice to the debtor, trustee and all creditors and a hearing. A full explanation of the necessity of services and documentation of time and materials expended must be attached to the application or it will not be considered.

II. Payment of Fee
  (a) An attorney may accept an amount of compensation in advance of the filing of the Chapter 13 proceeding up to the maximum of $500.00 presumptively fair fee on the following conditions:
  (i) All court filing fees must be paid in full at the time the proceeding is filed (No installment fees to be applied for) and,

(ii) The debtor must appear at the time first set for the 341(a) meeting with no less than one full month's plan payment to turn over to the trustee.

(b) If an attorney accepts a retainer and either (i) or (ii) of (a) above is not met, the attorney must either pay the delinquent fees and/or plan payment from the retainer held.

(c) If an attorney elects to have all or part of the attorney fees paid through the Plan rather than as a retainer directly from the client, such fees shall be paid by the trustee as a priority claim.

ADVERSARY PROCEEDINGS (32 TO 35)

RULE NO. 32

SERVICE ON PARTIES

Any and all filings (except claims) in all proceedings under the Bankruptcy Code must be served on the debtor's attorney and trustee (including the Chapter 13 Standing Trustee) for the estate whether or not such Trustee is a party to the proceeding.

RULE NO. 33

MOTION PRACTICE FOR RELIEF FROM STAY AND AVOIDANCE OF LIENS

All motions for relief from stay and all motions to avoid liens filed in this Court shall be accompanied by a notice of motion and certificate of service, giving notice of the filing of the motion, allowing a specific response time to the motion, and setting forth the name and address of each person served with a copy of the motion and notice of motion. With respect to such motions, a responsive pleading shall be required to be filed by the respondent within fifteen (15) days of the date of the aforesaid notice of motion and certificate of service. A hearing on such motion may be ordered by the Court in its discretion, but unless so ordered, or unless a hearing is specifically requested in the motion or any responsive pleading thereto, such motion may be determined and final orders entered by the Court without a hearing.

Court Comment. — This supplements Rule 9014.

RULE NO. 34

ADVERSARY PROCEEDING COVER SHEET REQUIRED

All complaints initiating adversary proceedings in bankruptcy cases shall be accompanied by a fully completed Bankruptcy Cover Sheet (Form BC-104).

RULE NO. 35

DISMISSAL OF ADVERSARY PROCEEDING FOR LACK OF PROSECUTION

Except where a Complaint objecting to a discharge has been filed, an Adversary Proceeding may be dismissed by the Court for lack of prosecution as follows:

1) Where No Service of Process has been made and certified to the Court within thirty (30) days after filing of the Complaint; or
2) Where no responsive pleadings have been filed and plaintiff has not moved for Entry of Default within thirty (30) days after the time for filing responsive pleadings has expired.

Dismissal under the Local Rule shall be without prejudice unless the delay has resulted in prejudice to an opposing party.

FORMS

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In the Matter of:) Case No. ______________
)
) DEBTOR'S CLAIM FOR
) PROPERTY EXEMPTIONS
)
)
Debtor.)

I, ______________________________, the undersigned debtor, hereby claim the following property as exempt pursuant to Chapter 1C, Article 16, § 1C-1601 et seq. of the North Carolina General Statutes.

1. REAL OR PERSONAL PROPERTY USED BY DEBTOR OR DEBTOR'S DEPENDENT AS RESIDENCE OR BURIA PLOT. (Total net value not to exceed $7,500. Amount of the unused portion of first $2,500 may be carried forward to be applied on other property claimed as exempt.)

Description of Property & Address	Market Value	Mtg. Holder or Lien Holder	Amt. Mtg. or Lien	Net Value
____________	____	__________	________	____
____________	____	__________	________	____

(a) Total Net Value $______
Total Net Exemption $______

(b) Unused portion of first $2,500. (This amount, if any, may be used to claim an exemption in any property owned by the debtor.) $______

2. MOTOR VEHICLE. (Only one vehicle allowed under this paragraph with net value claimed as exempt not to exceed $1,000 plus any portion desired for use from paragraph 1(b) above.)

Model, Year Style of Auto	Market Value	Lien Holder	Amt. Lien	Net Value
____________	____	__________	________	____

(a) Statutory allowance $1,000
(b) Amount from 1(b) above to be used in this paragraph. (A part or all of 1(b) may be used as needed.) $________
Total Net Exemption $________

3. TOOLS OF TRADE OR PROFESSIONAL BOOKS. (Used by Debtor or Debtor's dependent. Total net value of all items claimed as exempt not to exceed $500.00.)

Description	Market Value	Lien Holder	Amt. Lien	Net Value
____________	____	__________	________	____
____________	____	__________	________	____

(a) Statutory allowance $ 500
(b) Amount from 1(b) above to be used in this paragraph. (A part or all of 1(b) may be used as needed.) $________
Total Net Exemption $________

. PERSONAL PROPERTY USED FOR HOUSEHOLD OR PERSONAL PURPOSES USED BY DEBTOR OR DEBTOR'S DEPENDENTS. (Debtor's total net value not to exceed $2,500 plus $500 for each dependent, but not to exceed $2,000 total for all dependents.)

Description of Property	Market Value	Lien Holder	Amt. Lien	Net Value
Clothing & Personal	______	______	______	______
Kitchen Appliances	______	______	______	______
Stove	______	______	______	______
Refrigerator	______	______	______	______
Freezer	______	______	______	______
Washing Machine	______	______	______	______
Dryer	______	______	______	______
China	______	______	______	______
Silver	______	______	______	______
Jewelry	______	______	______	______
Living Room Furniture	______	______	______	______
Den Furniture	______	______	______	______
Bedroom Furniture	______	______	______	______
Dining Room Furniture	______	______	______	______
Lawn Furniture	______	______	______	______
Television	______	______	______	______
( ) Stereo ( ) Radio	______	______	______	______
Musical Instruments	______	______	______	______
( ) Piano ( ) Organ	______	______	______	______
Air Conditioner/Dehumid.	______	______	______	______
Paintings & Art	______	______	______	______
Lawn Mower	______	______	______	______
Yard Tools	______	______	______	______
Crops	______	______	______	______
Animals	______	______	______	______
Recreational Equipment	______	______	______	______
			Total Net Value	______

(a) Statutory allowance for debtor ______

(b) Statutory allowance for debtor's dependents: ______ dependents at $500 each (not to exceed $2,000 for total dependents) ______

(c) Amount from 1(b) above to be used in this paragraph. (A part or all of 1(b) may be used as needed.) ______

Total Net Exemption ______

5. LIFE INSURANCE. (As provided in Article X, Section 5 of North Carolina Constitution.

Name of Insurance Company ______________________ Policy No. ______

Name of Insured ______________________ Policy Date ______

Name of Beneficiary ______________________

5. PROFESSIONALLY PRESCRIBED HEALTH AIDS (FOR DEBTOR OR DEBTOR'S DEPENDENTS). (No limit on value or number of items.)

Description: ______________________

____

7. DEBTOR'S RIGHT TO RECEIVE FOLLOWING COMPENSATION:
(No limit on number or amount.)

A. $__________ Compensation for personal injury to debtor or to person on whom debtor was dependent for support.

B. $__________ Compensation for death of person on whom debtor was dependent for support.

8. ANY OTHER REAL OR PERSONAL PROPERTY WHICH DEBTOR DESIRES TO CLAIM AS EXEMPT THAT HAS NOT PREVIOUSLY BEEN CLAIMED ABOVE. (THE AMOUNT CLAIMED MAY NOT EXCEED THE REMAININ AMOUNT AVAILABLE UNDER PARAGRAPH 1(b) WHICH HAS NOT BEEN USED FOR OTHER EXEMPTIONS.)

Description	Market Value	Lien Holder	Amt. Lien	Net Value

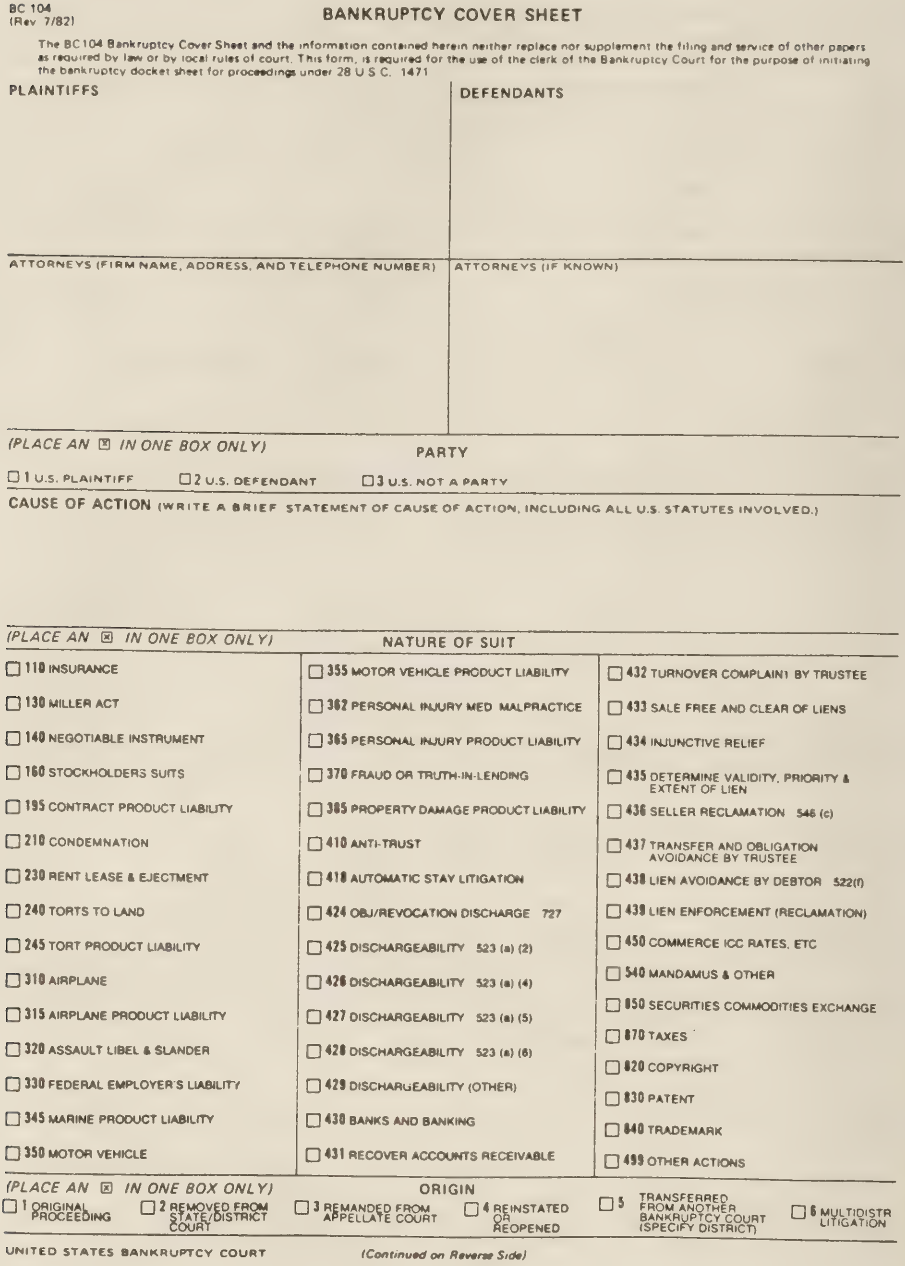
(a) Total Net Value of property claimed in paragraph 8. $___
(b) Total amount available from paragraph 1(b). $________
(c) Less amount available under paragraph 1(b) which was used in other paragraphs:
Paragraph 2(b) $________
Paragraph 3(b) $________
Paragraph 4(c) $________
Net Balance Available from paragraph 1(b) $___
Total Net Exemption $___

9. THE FOLLOWING TANGIBLE PERSONAL PROPERTY WAS PURCHASED BY THE DEBTOR WITHIN 90 DAYS OF THE FILING OF THE BANKRUPTCY PETITION:

Description	Market Value	Lien Holder	Amt. Lien	Net Value

None of the property listed in paragraph 9 has been included in this Request for Exempt Property. (Tangible personal property purchased within 90 days of the filin of the petition cannot be exempted.)

DATE:________________ ________________
Debtor



BC 104
(Rev 7/82)

BANKRUPTCY COVER SHEET

The BC 104 Bankruptcy Cover Sheet and the information contained herein neither replace nor supplement the filing and service of other papers as required by law or by local rules of court. This form, is required for the use of the clerk of the Bankruptcy Court for the purpose of initiating the bankruptcy docket sheet for proceedings under 28 U S C. 1471

PLAINTIFFS	DEFENDANTS
ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)	ATTORNEYS (IF KNOWN)

(PLACE AN ☒ IN ONE BOX ONLY) PARTY

☐ 1 U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☐ 3 U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED.)

(PLACE AN ☒ IN ONE BOX ONLY) NATURE OF SUIT

☐ 110 INSURANCE
☐ 130 MILLER ACT
☐ 140 NEGOTIABLE INSTRUMENT
☐ 160 STOCKHOLDERS SUITS
☐ 195 CONTRACT PRODUCT LIABILITY
☐ 210 CONDEMNATION
☐ 230 RENT LEASE & EJECTMENT
☐ 240 TORTS TO LAND
☐ 245 TORT PRODUCT LIABILITY
☐ 310 AIRPLANE
☐ 315 AIRPLANE PRODUCT LIABILITY
☐ 320 ASSAULT LIBEL & SLANDER
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☐ 355 MOTOR VEHICLE PRODUCT LIABILITY
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☐ 365 PERSONAL INJURY PRODUCT LIABILITY
☐ 370 FRAUD OR TRUTH-IN-LENDING
☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY
☐ 410 ANTI-TRUST
☐ 418 AUTOMATIC STAY LITIGATION
☐ 424 OBJ/REVOCATION DISCHARGE 727
☐ 425 DISCHARGEABILITY 523 (a) (2)
☐ 426 DISCHARGEABILITY 523 (a) (4)
☐ 427 DISCHARGEABILITY 523 (a) (5)
☐ 428 DISCHARGEABILITY 523 (a) (6)
☐ 429 DISCHARGEABILITY (OTHER)
☐ 430 BANKS AND BANKING
☐ 431 RECOVER ACCOUNTS RECEIVABLE
☐ 432 TURNOVER COMPLAINT BY TRUSTEE
☐ 433 SALE FREE AND CLEAR OF LIENS
☐ 434 INJUNCTIVE RELIEF
☐ 435 DETERMINE VALIDITY, PRIORITY & EXTENT OF LIEN
☐ 436 SELLER RECLAMATION 546 (c)
☐ 437 TRANSFER AND OBLIGATION AVOIDANCE BY TRUSTEE
☐ 438 LIEN AVOIDANCE BY DEBTOR 522(f)
☐ 439 LIEN ENFORCEMENT (RECLAMATION)
☐ 450 COMMERCE ICC RATES, ETC
☐ 540 MANDAMUS & OTHER
☐ 850 SECURITIES COMMODITIES EXCHANGE
☐ 870 TAXES
☐ 820 COPYRIGHT
☐ 830 PATENT
☐ 840 TRADEMARK
☐ 499 OTHER ACTIONS

(PLACE AN ☒ IN ONE BOX ONLY) ORIGIN

☐ 1 ORIGINAL PROCEEDING ☐ 2 REMOVED FROM STATE/DISTRICT COURT ☐ 3 REMANDED FROM APPELLATE COURT ☐ 4 REINSTATED OR REOPENED ☐ 5 TRANSFERRED FROM ANOTHER BANKRUPTCY COURT (SPECIFY DISTRICT) ☐ 6 MULTIDISTR LITIGATION

UNITED STATES BANKRUPTCY COURT *(Continued on Reverse Side)*

BC 104
(Rev. 7/82)

BANKRUPTCY COVER SHEET (Reverse Side)

REMARKS

Check/Fill in if demanded in complaint.

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND $	OTHER

RELATED PROCEEDING(S), IF ANY, PENDING

JUDGE ____________ BANKRUPTCY DOCKET NUMBER ____________

PROCEEDINGS RISING OUT OF BANKRUPTCY CASES ARE DEEMED RELATED IF PROCEEDINGS INVOLVE

☐ 1. SAME PROPERTY

☐ 2. SAME ISSUE OF FACT OR SAME TRANSACTION

☐ 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT COPYRIGHT OR TRADEMARK

Check YES only if demanded in complaint:
JURY DEMAND: ☐ YES ☐ NO

DATE SIGNATURE OF ATTORNEY OF RECORD

INSTRUCTIONS

Form BC 104, Bankruptcy Cover Sheet, and the information contained therein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the clerk of the bankruptcy court in initiating the bankruptcy docket sheet for adversary proceedings under 28 U.S.C. Section 1471, and to facilitate the gathering of statistical information. Accordingly, a bankruptcy proceeding cover sheet is to be submitted to the clerk of the bankruptcy court for each complaint filed. The form is largely self explanatory. Two areas needing possible explanation are the CAUSE OF ACTION and NATURE OF SUIT portions of the form.

Under *Cause of Action* give a brief narrative description of the cause of action including all Federal statutes involved. For example, "Complaint seeking damages for failure to disclose information, Consumer Credit Protection Act, 15 U.S.C. 1601 et. seq.".

Under *Nature of Suit* place an "X" in the appropriate box. Only one box should be checked. If the cause fits more than one nature of suit, select the most definitive. This list is not all-inclusive. If the action does not fall within one of the specifically listed categories, you should check #499, other actions, [e.g., a tort action other than one specifically listed or an action pursuant to E.R.I.S.A.].

Because there are several categories involving liens, the following additional information should be used as a guide in making the proper selection.

#437 Transfer and Obligation Avoidance By Trustee — Complaint by a trustee to avoid a transfer, lien or obligation pursuant to any of a trustee's powers to do so

#433 Sale Free and Clear of Lien — Complaint to sell property free and clear of any interest in such property.

#439 Lien Enforcement (Reclamation) — Complaint by a party who has a lien against property of the estate seeking to 1) terminate or modify the automatic stay, 2) obtain possession, and 3) foreclose all other interests in the property. If a secured party seeks only to lift the stay with respect to such property, then #418 automatic stay litigation should be checked

#435 Determine Validity, Priority or Extent of Lien — Complaint asking court to make a determination involving a question of a lien's validity, priority or amount.

#438 Lien Avoidance By Debtor §522 — Complaint by debtor to avoid a lien to the extent it impairs an exemption.

If this adversary proceeding is related to any other pending adversary proceeding, enter the six digit adversary proceeding docket number in the space indicated. ALSO indicate in the "Remarks" portion of the form the name of the debtor in, and the name of the docket number of, the bankruptcy *case* out of which the proceeding arose, and identify the district where the bankruptcy case is pending or was pending when closed, if different from the district in which this proceeding is being filed.

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RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

As amended through August 1, 1982

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2. Petition.
3. Filing petition.
4. Preliminary consideration by judge.
5. Answer; contents.
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7. Expansion of record.
8. Evidentiary hearing.
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Appendix of Forms

Model form for use in applications for habeas corpus under 28 U.S.C. § 2254.

Model form for use in 28 U.S.C. § 2254 cases involving a Rule 9 issue.

Rule 1. Scope of Rules.

(a) *Applicable to Cases Involving Custody Pursuant to a Judgment of a State Court.* These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:

(1) By a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) By a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) *Other Situations.* In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

Rule 2. Petition.

(a) *Applicants in Present Custody.* If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(b) *Applicants Subject to Future Custody.* If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

(c) *Form of Petition.* The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner. *(Amended effective August 1, 1982.)*

(d) *Petition to Be Directed to Judgments of One Court Only.* A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(e) *Return of Insufficient Petition.* If a petition received by the clerk of a district court does not substantially comply with the requirements of Rule 2 or Rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

Rule 3. Filing Petition.

(a) *Place of Filing; Copies; Filing Fee.* A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U.S.C. § 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.

(b) *Filing and Service.* Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with Rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

Rule 4. Preliminary Consideration by Judge.

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

Rule 5. Answer; Contents.

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

Rule 6. Discovery.

(a) *Leave of Court Required.* A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).

(b) *Requests for Discovery.* Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) *Expenses.* If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

CASE NOTES

Discovery Generally. — As is now expressly provided in the rules governing habeas corpus cases, the district judge (or a magistrate to whom the case may be referred) may employ a variety of measures in an effort to avoid the need for an evidentiary hearing. Under Rule 6, a party may request and the judge may direct that discovery take place, and there may be instances in which discovery would be appropriate (prior to an evidentiary hearing) and would show such a hearing to be unnecessary. Under Rule 7, the judge can direct expansion of the record to include any appropriate materials that enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

Rule 7. Expansion of Record.

(a) *Direction for Expansion.* If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) *Materials to Be Added.* The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) *Submission to Opposing Party.* In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) *Authentication.* The court may require the authentication of any material under subdivision (b) or (c).

CASE NOTES

Applied in Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

Rule 8. Evidentiary Hearing.

(a) *Determination by Court.* If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

(b) *Function of the Magistrate.*

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) *Appointment of Counsel; Time for Hearing.* If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires.

Rule 9. Delayed or Successive Petitions.

(a) *Delayed Petitions.* A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) *Successive Petitions.* A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

CASE NOTES

Applied in Young v. Sams, 510 F. Supp. 141 (E.D.N.C. 1981).

Rule 10. Powers of Magistrates.

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636. *(Amended effective August 1, 1979.)*

Rule 11. Federal Rules of Civil Procedure; Extent of Applicability.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

APPENDIX OF FORMS

(Amended effective August 1, 1982.)

Model Form for Use in Applications for Habeas Corpus Under 28 U.S.C. § 2254

Name ______________________________
Prison number ______________________________
____
Place of confinement ______________________________
United States District Court __________ District of ______________
Case No. ______________________________
(To be supplied by Clerk of U. S. District Court)

______________________________, PETITIONER
(Full name)

v.

______________________________, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF ______________
______________________________, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future,* petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions — Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis,* in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis,* you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $ __________, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, *the original and two copies* must be mailed to the Clerk of the United States District Court whose address is ______________________________

____

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack ______________________________

____

2. Date of judgment of conviction ______________________________
3. Length of sentence ______________________________
4. Nature of offense involved (all counts) ______________________________

____

____

____

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: ______________________________

____

____

____

6. Kind of trial: (Check one)
   (a) Jury ☐
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐
9. If you did appeal, answer the following:
   (a) Name of court ______________________________
   (b) Result ______________________________
   (c) Date of result ______________________________
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☐ No ☐
11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court ______________________________
    (2) Nature of proceeding ______________________________

____

    (3) Grounds raised ______________________________

____

____

____

____

____

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result ____________________

(6) Date of result ____________________

(b) As to any second petition, application or motion give the same information:

(1) Name of court ____________________

(2) Nature of proceeding ____________________

____

(3) Grounds raised ____________________

____

____

____

____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result ____________________

(6) Date of result ____________________

(c) As to any third petition, application or motion, give the same information:

(1) Name of court ____________________

(2) Nature of proceeding ____________________

____

(3) Grounds raised ____________________

____

____

____

____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result ____________________

(6) Date of result ____________________

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

____

____

____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional ground and *facts* supporting same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do you not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: ____
____

Supporting FACTS (tell your story *briefly* without citing cases or law):
____
____
____
____
____
____
____

B. Ground two: ____
____

Supporting FACTS (tell your story *briefly* without citing cases or law):
____
____
____
____
____
____
____

C. Ground three: ____
____

Supporting FACTS (tell your story *briefly* without citing cases or law):
____
____
____
____

D. Ground four: ______

Supporting FACTS (tell your story *briefly* without citing cases or law): ______

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: ______

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing ______
(b) At arraignment and plea ______
(c) At trial ______
(d) At sentencing ______
(e) On appeal ______
(f) In any post-conviction proceeding ______
(g) On appeal from any adverse ruling in a post-conviction proceeding ______

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐
(a) If so, give name and location of court which imposed sentence to be served in the future: ______
(b) And give date and length of sentence to be served in the future: ______
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on ______________.
(date)

____
Signature of Petitioner

IN FORMA PAUPERIS DECLARATION

____
[Insert appropriate court]

__________________ (Petitioner) v. __________________ (Respondent(s))	DECLARATION IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, ______________, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.
   ____
   ____
   ____
   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.
   ____
   ____

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes ☐ No ☐
   b. Rent payments, interest or dividends? Yes ☐ No ☐
   c. Pensions, annuities or life insurance payments? Yes ☐ No ☐
   d. Gifts or inheritances? Yes ☐ No ☐
   e. Any other sources? Yes ☐ No ☐

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.
   ____
   ____
   ____
   ____
   ____
   ____

3. Do you own cash, or do you have money in checking or savings account? Yes ☐ No ☐ (Include any funds in prison accounts.)

   If the answer is "yes," state the total value of the items owned.
   ____
   ____

---

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes ☐ No ☐

   If the answer is "yes," describe the property and state its approximate value. ________________________________

   ____

   ____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. ________________________________

   ____

   ____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on __________.
(date)

____
Signature of Petitioner

Certificate

I hereby certify that the petitioner herein has the sum of $ __________ on account to his credit at the ______________ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said ________ institution: ____________

____

____

____

____
Authorized Officer of
Institution

Model Form for Use in 28 U.S.C. § 2254 Cases Involving a Rule 9 Issue

Form No. 9
United States District Court,
________________ District of ________________
Case No. ________________
________________, PETITIONER
v.
________________, RESPONDENT
and
________________, ADDITIONAL RESPONDENT

Petitioner's Response as to Why His Petition Should Not be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or successive petitions

(a) **Delayed petitions.** A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) **Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(II) Your petition for habeas corpus has been found to be subject to dismissal under rule 9( ) for the following reason(s):

____
____
____
____

(III) This form has been sent so that you may explain why your petition contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within __________ days. Failure to do so will result in the automatic dismissal of your petition.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is ________________________________
____

(V) This response must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 *or* 5 below, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your petition is attacking was entered?
   Yes ☐ No ☐
2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. ____________________
   ____
3. Describe the nature of the assistance, including the names of those who rendered it to you. ____________________
   ____
   ____
   ____
4. If your petition is in jeopardy because of delay prejudicial to the state under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions. ____________________
   ____
   ____
   ____
   ____
5. If your petition is in jeopardy under rule 9(b) because it asserts the same grounds as a previous petition, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior petition, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions. ____________________
   ____
   ____
   ____
   ____
   ____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on ____________________.
____________________ (date)

____
Signature of Petitioner

Index to Rules Governing Section 2254 Cases in the United States District Courts

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A

ANSWER, Rule 5.

D

DELAYED PETITIONS, Rule 9.

DISCOVERY, Rule 6.

E

EVIDENTIARY HEARING, Rule 8.

F

FEDERAL RULES OF CIVIL PROCEDURE.
  Applicability, Rule 11.

FORMS, Rules, appx.

H

HEARINGS.
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M

MAGISTRATES.
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P

PETITION, Rule 2.
  Answer, Rule 5.
  Delayed or successive petitions, Rule 9.
  Filing, Rule 3.
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R

RECORD.
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S

SCOPE OF RULES, Rule 1.

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RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

As amended through August 1, 1982

Index follows these rules.

Rule
1. Scope of rules.
2. Motion.
3. Filing motion.
4. Preliminary consideration by judge.
5. Answer; contents.
6. Discovery.
7. Expansion of record.
8. Evidentiary hearing.
9. Delayed or successive motions.
10. Powers of magistrates.

Rule
11. Time for appeal.
12. Federal Rules of Criminal and Civil Procedure; extent of applicability.

Appendix of Forms

Model form for motions under 28 U.S.C. § 2255.
Model form for use in 28 U.S.C. § 2255 cases involving a Rule 9 issue.

Rule 1. Scope of Rules.

These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255:

(1) By a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) By a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

Rule 2. Motion.

(a) *Nature of Application for Relief.* If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

(b) *Form of Motion.* The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner. *(Amended effective August 1, 1982.)*

(c) *Movant to Be Directed to One Judgment Only.* A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

(d) *Return of Insufficient Motion.* If a motion received by the clerk of a district court does not substantially comply with the requirements of Rule 2 or Rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

Rule 3. Filing Motion.

(a) *Place of Filing; Copies.* A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.

(b) *Filing and Service.* Upon receipt of the motion and having ascertained that it appears on its face to comply with Rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

Rule 4. Preliminary Consideration by Judge.

(a) *Reference to Judge; Dismissal or Order to Answer.* The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

(b) *Initial Consideration by Judge.* The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 5. Answer; Contents.

(a) *Contents of Answer.* The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.

(b) *Supplementing the Answer.* The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.

Rule 6. Discovery.

(a) *Leave of Court Required.* A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U.S.C. § 3006A(g).

(b) *Requests for Discovery.* Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) *Expenses.* If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

Rule 7. Expansion of Record.

(a) *Direction for Expansion.* If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(b) *Materials to Be Added.* The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) *Submission to Opposing Party.* In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) *Authentication.* The court may require the authentication of any material under subdivision (b) or (c).

Rule 8. Evidentiary Hearing.

(a) *Determination by Court.* If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) *Function of the Magistrate.*

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) *Appointment of Counsel; Time for Hearing.* If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.

Rule 9. Delayed or Successive Motions.

(a) *Delayed Motions.* A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) *Successive Motions.* A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior action constituted an abuse of the procedure governed by these rules.

Rule 10. Powers of Magistrates.

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636. *(Amended effective August 1, 1979.)*

Rule 11. Time for Appeal.

The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

Rule 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability.

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

APPENDIX OF FORMS

(Amended effective August 1, 1982.)

Model Form for Motions Under 28 U.S.C. § 2255

Name ______________________________
Prison Number ______________________________
Place of Confinement ______________________________
United States District Court ____________ District of ______________
Case No. ____________ (to be supplied by Clerk of U. S. District Court) United States,

v.

____

(full name of movant)

(If movant has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

Instructions—Read Carefully

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis,* in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis,* you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is
____
____

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack ____________________
2. Date of judgment of conviction ____________________
3. Length of sentence ____________________
4. Nature of offense involved (all counts) ____________________

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: ____________________

6. Kind of trial. (Check one)
   (a) Jury ☐
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐
9. If you did appeal, answer the following:
   (a) Name of court ____________________
   (b) Result ____________________
   (c) Date of result ____________________
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
   Yes ☐ No ☐
11. If your answer to 10 was "yes," give the following information:
   (a) (1) Name of court ____________________
   (2) Nature of proceeding ____________________
   (3) Grounds raised ____________________
   (4) Did you receive an evidentiary hearing on your petition, application or motion?
   Yes ☐ No ☐
   (5) Result ____________________
   (6) Date of result ____________________
   (b) As to any second petition, application or motion give the same information:
   (1) Name of court ____________________
   (2) Nature of proceeding ____________________
   (3) Grounds raised ____________________

____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
(5) Result ______________________________
(6) Date of result ______________________________

(c) As to any third petition, application or motion, give the same information:
(1) Name of court ______________________________
(2) Nature of proceeding ______________________________
____
(3) Grounds raised ______________________________
____
____
____
____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☐ No ☐
(2) Second petiton, etc. Yes ☐ No ☐
(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:
____
____
____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

Caution: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: ______

Supporting FACTS (tell your story *briefly* without citing cases or law): ______

B. Ground two: ______

Supporting FACTS (tell your story *briefly* without citing cases or law): ______

C. Ground three: ______

Supporting FACTS (tell your story *briefly* without citing cases or law): ______

D. Ground four: ______

Supporting FACTS (tell your story *briefly* without citing cases or law): ______

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: ______

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing ______

(b) At arraignment and plea ____________________

(c) At trial ____________________

(d) At sentencing ____________________

(e) On appeal ____________________

(f) In any post-conviction proceeding ____________________

(g) On appeal from any adverse ruling in a post-conviction proceeding ____________________

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐
(a) If so, give name and location of court which imposed sentence to be served in the future: ____________________
(b) And give date and length of sentence to be served in the future: ____________________
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on ____________.
(date)

____
Signature of Movant

IN FORMA PAUPERIS DECLARATION

____
[Insert appropriate court]

United States
v.

____
(Movant)

DECLARATION IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

I, ____________, declare that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐
a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.
____

b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes ☐ No ☐
   b. Rent payments, interest or dividends? Yes ☐ No ☐
   c. Pensions, annuities or life insurance payments? Yes ☐ No ☐
   d. Gifts or inheritances? Yes ☐ No ☐
   e. Any other sources? Yes ☐ No ☐

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in a checking or savings account?
   Yes ☐ No ☐ (Include any funds in prison accounts)

   If the answer is "yes," state the total value of the items owned.

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   Yes ☐ No ☐

   If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on ____________.
(date)

____
Signature of Movant

CERTIFICATE

I hereby certify that the movant herein has the sum of $ ________ on account to his credit at the ________ institution where he is confined. I further certify that movant likewise has the following securities to his credit according to the records of said ________ institution: ________

____
Authorized Officer of
Institution

Model Form for Use in 28 U.S.C. § 2255 Cases Involving a Rule 9 Issue

Form No. 9

United States District Court
________________ District of ________________

Case No. ______________
United States
v.
____
(Name of Movant)

Movant's Response as to Why His Motion Should Not be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) **Rule 9. Delayed or Successive Motions**

(a) **Delayed motions.** A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) **Successive motions.** A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(II) Your motion to vacate, set aside, or correct sentence has been found to be subject to dismissal under rule 9 (   ) for the following reason(s):

____

____

____

____

(III) This form has been sent so that you may explain why your motion contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within __________ days. Failure to do so will result in the automatic dismissal of your motion.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is ________________________________

____

(V) This response must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 *or* 5, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered?
   Yes ☐ No ☐
2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. ______________________________
   ____
3. Describe the nature of the assistance, including the names of those who rendered it to you. ______________________________
   ____
   ____
   ____
4. If your motion is in jeopardy because of delay prejudicial to the government under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions. ______________
   ____
   ____
   ____
   ____
5. If your motion is in jeopardy under rule 9(b) because it asserts the same grounds as a previous motion, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior motion, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions. ______________________________
   ____
   ____
   ____
   ____
   ____
   ____
   ____
   ____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on ______________.
(date)

____
Signature of Movant

Index to Rules Governing Section 2255 Proceedings for the United States District Courts

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RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

The following rules were adopted by order of the Supreme Court of the United States, effective June 1, 1980. These rules supersede the Rules for the Trial of Minor Offenses before United States Magistrates promulgated by the Supreme Court on January 27, 1971.

Index follows these rules.

Rule
1. Scope.
2. Pretrial Procedures.
3. Additional Procedures Applicable Only to Petty Offenses for Which No Sentence of Imprisonment Will Be Imposed.
4. Securing Defendant's Appearance; Payment in Lieu of Appearance.

Rule
5. Record.
6. New Trial.
7. Appeal.
8. Local Rules.
9. (Effective November 1, 1986) Definition.

Rule 1. Scope.

(a) *In General.* These rules govern the procedure and practice for the conduct of proceedings in misdemeanor cases, including petty offenses, before United States magistrates under 18 U.S.C. § 3401, and for appeals in such cases to judges of the district courts.

(b) *Applicability of Federal Rules of Criminal Procedure.* Except as specifically provided by these rules, the Federal Rules of Criminal Procedure govern all proceedings except those concerning petty offenses for which no sentence of imprisonment will be imposed. Proceedings concerning petty offenses for which no sentence of imprisonment will be imposed are not governed by the Federal Rules of Criminal Procedure, except as specifically provided therein or by these rules. However, to the extent they are not inconsistent with these rules, a magistrate may follow such provisions of the Federal Rules of Criminal Procedure as he deems appropriate.

(c) *Definition.* The term "petty offenses for which no sentence of imprisonment will be imposed," as used in these rules, means any petty offenses, regardless of the penalty authorized by law, as to which the magistrate determines that, in the event of conviction, no sentence of imprisonment will actually be imposed in the particular case.

Rule 2. Pretrial Procedures.

(a) *Trial Document.* The trial of a misdemeanor may proceed on an indictment, information, or complaint or, if it be a petty offense, on a citation or violation notice. The district court, by order or local rule, may make provision for the reference of such cases to a magistrate.

(b) *Initial Appearance.* At the defendant's initial appearance on a misdemeanor charge, the magistrate shall inform the defendant of the following:

(1) the charge against him, and the maximum possible penalty provided by law;

(2) his right to retain counsel;

(3) unless he is charged with a petty offense for which appointment of counsel is not required, his right to request the assignment of counsel if he is unable to obtain counsel;

(4) that he is not required to make a statement and that any statement made by him may be used against him;

(5) that he has a right to trial, judgment and sentencing before a judge of the district court;

(6) unless the offense charged is a petty offense, that he has a right to trial by jury before either a magistrate or a judge of the district court;

(7) if the prosecution is not on an indictment or information and is for a misdemeanor other than a petty offense, that he has a right to have a preliminary examination unless he consents to be tried before the magistrate; and

(8) if he is in custody, of the general circumstances under which he may secure pretrial release.

(c) *Consent and Arraignment.* If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea to the misdemeanor charge. The defendant may plead not guilty, guilty or, with the consent of the magistrate,*nolo contendere.* If the defendant pleads not guilty, the magistrate shall either conduct the trial within 30 days upon written consent of the defendant or fix a later time for the trial, giving due regard to the needs of the parties to consult with counsel and prepare for trial.

Rule 3. Additional Procedures Applicable Only to Petty Offenses for Which No Sentence of Imprisonment Will Be Imposed.

(a) *Failure to Consent.* If the defendant charged with a petty offense for which no sentence of imprisonment will be imposed does not consent to trial before the magistrate, he shall be ordered to appear before a judge of the district court for further proceedings on notice. The file shall be transmitted forthwith to the clerk of the district court.

(b) *Plea of Guilty or Nolo Contendere.* No plea of guilty or *nolo contendere* to a petty offense for which no sentence of imprisonment will be imposed shall be accepted unless the magistrate is satisfied that the defendant understands the nature of the charge and the maximum possible penalty provided by law.

(c) *Waiver of Venue for Plea and Sentence.* A defendant charged with a petty offense for which no sentence of imprisonment will be imposed who is arrested, held, or present in a district other than that in which an indictment, information, complaint, citation or violation notice is pending against him may state in writing that he wishes to plead guilty or *nolo contendere,* to waive venue and trial in the district in which the proceeding against him is pending, and to consent to disposition of the case in the district in which he was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of same shall be given to the magistrate in the district where the proceeding was originally commenced. The defendant's statement that he wishes to plead guilty or *nolo contendere* shall not be used against him.

(d) *Sentence.* If the defendant charged with a petty offense for which no sentence of imprisonment will be imposed pleads guilty or *nolo contendere* or is found guilty after trial, the magistrate shall afford him an opportunity to be heard in mitigation. The magistrate shall then immediately proceed to sentence the defendant, except that in the discretion of the magistrate sentencing may be continued to allow an investigation by the probation service or the submission of additional information by either party.

(e) *Notification of Right to Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the magistrate shall advise the defendant of his right to appeal.

Rule 4. Securing Defendant's Appearance; Payment in Lieu of Appearance.

(a) *Forfeiture of Collateral.* When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable types of misdemeanor cases in lieu of appearance and as authorizing the termination of the proceedings. Such local rules may make provision for increases in such fixed sums not to exceed the maximum fine which could be imposed upon conviction.

(b) *Notice to Appear.* If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk of the district court or a magistrate may issue a notice for the defendant to appear before a magistrate on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to his last known address.

(c) *Summons or Warrant.* Upon an indictment or a showing by one of the other documents specified in Rule 2(a) of probable cause to believe that a misdemeanor has been committed and that the defendant has committed it, a magistrate may issue an arrest warrant or, if no warrant is requested by the attorney for the government, a summons. The showing shall be made in writing upon oath or under penalty of perjury, but the affiant need not appear before the magistrate. If the defendant fails to appear before the magistrate in response to a summons, the magistrate may summarily issue a warrant for his immediate arrest and appearance before the magistrate.

Rule 5. Record.

Proceedings under these rules shall be taken down by a reporter or recorded by suitable sound recording equipment. In the discretion of the magistrate or, in the case of a misdemeanor other than a petty offense, on timely request of either party as provided by local rule, the proceedings shall be taken down by a reporter. With the written consent of the defendant, the keeping of a verbatim record may be waived in petty offense cases.

Rule 6. New Trial.

The magistrate, on motion of a defendant, may grant a new trial if required in the interest of justice. The magistrate may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the magistrate may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after a finding of guilty or within such further time as the magistrate may fix during the 7-day period.

Rule 7. Appeal.

(a) *Interlocutory Appeal.* A decision or order by a magistrate which, if made by a judge of the district court, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a judge of the district court provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of the district court a statement specifying the decision or order from which an appeal is taken, and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate.

(b) *Appeal from Conviction.* An appeal from a judgment of conviction by a magistrate to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of the district court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate.

(c) *Record.* The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly by the magistrate to the clerk of the district court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(d) *Stay of Execution; Release Pending Appeal.* The provisions of Rule 38(a) of the Federal Rules of Criminal Procedure relating to stay of execution shall be applicable to a judgment of conviction entered by a magistrate. The defendant may be released pending appeal by the magistrate or a district judge in accordance with the provisions of law relating to release pending appeal from a judgment of conviction of a district court.

(e) *Scope of Appeal.* The defendant shall not be entitled to a trial *de novo* by the judge of the district court. The scope of appeal shall be the same as on an appeal from a judgment of a district court to a court of appeals.

Rule 8. Local Rules.

Rules adopted by a district court for the conduct of trials before magistrates shall not be inconsistent with these rules. Copies of all rules made by a district court shall, upon their promulgation, be filed with the clerk of the district court and furnished to the Administrative Office of the United States Courts.

Rule 9. (Effective November 1, 1986) Definition.

As used in theses rules, "petty offense" means a Class B or C misdemeanor or an infraction. (Adopted effective November 1, 1986.)

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(Removal from state courts to District Courts of the United States. Title 28, U.S. Code, §§ 1441-1452, and Rule 81(c) of Federal Rules of Civil Procedure.)

Index follows these rules.

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1442. Federal officers sued or prosecuted.
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§ 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown. (June 25, 1948, ch. 646, § 1, 62 Stat. 937; Oct. 21, 1976, Pub. L. 94-583, § 6, 90 Stat. 2898.)

§ 1442. Federal officers sued or prosecuted.

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties.

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process. (June 25, 1948, ch. 646, § 1, 62 Stat. 938.)

§ 1442a. Members of armed forces sued or prosecuted.

A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law, and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause. (Added Aug. 10, 1956, ch. 1041, § 19 (a), 70A Stat. 626.)

§ 1443. Civil rights cases.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. (June 25, 1948, ch. 646, § 1, 62 Stat. 938.)

§ 1444. Foreclosure action against United States.

Any action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending. (June 25, 1948, ch. 646, § 1, 62 Stat. 938; May 24, 1949, ch. 139, § 82, 63 Stat. 101.)

§ 1445. Nonremovable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; July 25, 1958, Pub. L. 85-554, § 5, 72 Stat. 415; Oct. 17, 1978, Pub. L. 95-473, § 2(a)(3)(A), 92 Stat. 1465; Oct. 20, 1978, Pub. L. 95-486, § 9(b), 92 Stat. 1634.)

§ 1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitled him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; May 24, 1949, ch. 139, § 83, 63 Stat. 101; September 29, 1965, Pub. L. 89-215, 79 Stat. 887; July 30, 1977, Pub. L. 95-78, § 3, 91 Stat. 321.)

§ 1447. Procedure after removal generally.

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise. (June 25, 1948, ch. 646, § 1, 61 Stat. 939; May 24, 1949, ch. 139, § 84, 63 Stat. 102; July 2, 1964, Pub. L. 88-352, Title IX, § 901, 78 Stat. 266.)

§ 1448. Process after removal.

In all cases removed from any State court to any district court of the United States in which any one or more of the defenants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case. (June 25, 1948, ch. 646, § 1, 62 Stat. 940.)

§ 1449. State court record supplied.

Where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any district court of the United States, and the clerk of such State court, upon demand, and the payment or tender of the legal fees, fails to deliver certified copies, the district court may, on affidavit reciting such facts, direct such record to be supplied by affidavit or otherwise. Thereupon such proceedings, trial, and judgment may be had in such district court, and all such process awarded, as if certified copies had been filed in the district court. (June 25, 1948, ch. 646, § 1, 62 Stat. 940; May 24, 1949, ch. 139, § 85, 63 Stat. 102.)

§ 1450. Attachment or sequestration; securities.

Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court. (June 25, 1948, ch. 646, § 1, 62 Stat. 940.)

§ 1451. Definitions.

For purposes of this chapter—

(1) The term "State court" includes the Superior Court of the District of Columbia.

(2) The term "State" includes the District of Columbia. (July 29, 1970, Pub. L. 91-358, Title I, § 172(d)(1), 84 Stat. 591.)

§ 1452. Removal of claims related to bankruptcy cases.

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise. (Added Pub.L. 98-353, Title I, § 103(a), July 10, 1984, 98 Stat. 335.)

Federal Rules of Civil Procedure

Rule 81. Applicability in general.

(c) Removed Actions.

These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

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(Title 28, U.S. Code, §§ 1738-1741, and Rule 44 of Federal Rules of Civil Procedure.)

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§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

§ 1738A. Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term —

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the Child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination. (Dec. 28, 1980, Pub. L. 96-611, § 8(a), 94 Stat. 3569.)

§ 1739. State and Territorial nonjudicial records; full faith and credit.

All nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other State, Territory, or Possession by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or Possession in which it is made.

Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken. (June 25, 1948, c. 646, § 1, 62 Stat. 947.)

§ 1740. Copies of consular papers.

Copies of all official documents and papers in the office of any consul or vice consul of the United States, and of all official entries in the books or records of any such office, authenticated by the consul or vice consul, shall be admissible equally with the originals. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

§ 1741. Foreign official documents.

An official record or document of a foreign country may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Procedure. (June 25, 1948, ch. 646, § 1, 62 Stat. 948; May 24, 1949, ch. 139, § 92 (b), 63 Stat. 103; Oct. 3, 1964, Pub. L. 88-619, § 5 (a), 78 Stat. 996.)

Federal Rules of Civil Procedure

Rule 44. Proof of official record.

(a) Authentication.

(1) *Domestic.* An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or

political subdivision in which the record is kept, authenticated by the seal of his office.

(2) *Foreign.* A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record.

A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a) (2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof.

This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

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EXTRADITION

(The following publication, "State of North Carolina Extradition Manual," was published by the North Carolina Courts Center, Institute of Government, the University of North Carolina at Chapel Hill in 1980.)

Index follows these rules.

STATE OF NORTH CAROLINA
EXTRADITION MANUAL

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EXTRADITION GENERALLY

Extradition is the procedure by which a person who has committed a crime in one state (or escaped from prison or violated probation or parole) and fled to another state is returned to the first state. The purpose of this section of the *Extradition Manual* is to give the reader an overview of the extradition process. For those with a limited role, such as the arresting officer or the magistrate, this general description should help them understand how their actions fit in the overall process. More specific instructions for the different stages in the extradition process are given in other sections of the manual.

To begin, consider the case of a person who commits a crime — say, armed robbery — in another state, Ohio, and flees to North Carolina. Probably he has already been formally charged in Ohio, either by indictment or by the issuance of an arrest warrant there. When his presence in North Carolina is discovered, he may be arrested by a North Carolina officer, either with or without an arrest warrant from a North Carolina magistrate.

An arrest without a warrant, which is the less common practice, may be made only if the crime committed in Ohio is punishable there by more than one year's imprisonment. After arresting without a warrant, the officer must take the defendant before a North Carolina magistrate as soon as possible for issuance of a magistrate's order, just as he would do if the person had been arrested for committing a crime in this state. The magistrate determines whether the person has been charged in Ohio with armed robbery, whether armed robbery is punishable by more than a year's imprisonment in Ohio, and whether the person has fled from Ohio. The magistrate is not determining whether there is probable cause to believe the person committed the armed robbery — only whether he has been so charged in Ohio. If the magistrate finds that such is the case, he puts the defendant under bail as he would someone charged with a North Carolina crime, but bail may not be allowed if the crime is punishable by either death or life imprisonment.

More likely, the officer will go to a magistrate to obtain a North Carolina arrest warrant, called a fugitive warrant, before making the arrest. In that case, it is not necessary that the crime be punishable by more than one year's imprisonment; a warrant may be issued if the defendant has been charged with any crime in another state. Once the fugitive warrant is issued, the officer is to make the arrest and take the defendant before the magistrate as soon as possible for setting bail, just as he would for a North Carolina crime.

Usually, the basis for determining that the defendant has been charged with a crime in another state is a National Crime Information Center (NCIC) message on the Police Information Network (PIN) terminal. Such a message by itself is a sufficient basis for the magistrate's finding that the fugitive has been charged in the other state. Although a message is not supposed to appear in the NCIC files unless the warrant is still outstanding and the other state intends to extradite, it is a good practice for the officer to confirm the NCIC report with someone in the other state before making an arrest.

Sometimes the officer's information that a person is a fugitive may come from another source, such as a telephone call, telegram, or letter from an officer in another state. Such information may be used to determine whether the defendant has been charged in the other state. In cases such as these, and in cases in which an NCIC message is used, the other state should be requested to send a copy of the warrant or indictment as soon as possible so that it can be attached to the North Carolina warrant.

Another possibility, though unusual, is that the person has not yet been formally charged in the other state. For example, a person may have robbed a convenience store in Virginia late at night and fled to North Carolina, but no warrant has been issued because no judicial official was on duty in Virginia. The statutes do allow North Carolina officers to arrest fugitives in such cases, but the arrest may be made only after a North Carolina warrant has been issued, and that warrant may be issued only after the magistrate makes the same kind of finding of probable cause he would have to make if it were a North Carolina crime. That is, the magistrate must find probable cause that the defendant committed the crime in Virginia. The most likely basis for that probable cause will be information relayed by Virginia officers through North Carolina officers. Once the warrant is issued, the officer proceeds the same as in the other fugitive cases mentioned above.

It may also be that the fugitive has already been convicted in the other state and has escaped or has fled in violation of the conditions of his probation or parole. In such cases the magistrate simply determines that the fugitive was convicted and fled. The procedures are otherwise the same as for the person who has not yet been tried in the other state.

Once arrested, the fugitive is held until formal extradition procedures can take place. If he wishes to do so, he may waive extradition in front of a clerk of court or a judge and be immediately released to the state from which he fled. Many fugitives choose to do this, knowing that they will be extradited and not wishing to spend the time required for formal extradition. The waiver must be in writing.

If the fugitive does not waive extradition, the next step is for the state from which he fled to formally request the Governor of North Carolina to extradite. The request will come from the governor of the other state, on the basis of information supplied by the prosecutor in the county where the crime was committed. The extradition request to North Carolina includes a copy of the warrant or indictment against the fugitive, plus other papers establishing all the requirements of the formal extradition process. These papers are sent by the Governor's Extradition Secretary to the North Carolina Attorney General's office to determine whether they are legally sufficient to justify extradition through issuance of a Governor's Warrant. The only questions asked by the Governor of North Carolina in deciding whether to extradite are whether the fugitive has actually been charged with a crime in another state and whether the person arrested in North Carolina is the fugitive. The Governor's office does not attempt to determine whether there was probable cause for the charge; that is considered a matter between the other state and the fugitive — just like other defenses he might raise, such as self-defense or alibi.

The fugitive should be notified by the magistrate and district court judge that he may question the legal sufficiency of the paper submitted by the other state to the Governor's office. That is done by sending a written request to the

Governor's office outlining the basis of his challenge. If the Governor determines that the fugitive should be heard on this matter, he will direct that a hearing be held by the Attorney General's office.

If the Governor's office is satisfied, either with or without a hearing, that the requirements of extradition have been met by the other state, the Governor issues what is known as a Governor's Warrant. This paper authorizes the fugitive to be taken into custody — in fact, he may already be in custody if he was not allowed bail or could not make bail — to be turned over to an agent of the other state. Before being turned over, the fugitive is to be taken before a judge to be informed that he has the right to challenge the legality of his arrest through habeas corpus proceedings and to have counsel appointed for that purpose if he cannot afford a lawyer. The habeas corpus proceeding is held in North Carolina; the only grounds for challenging the arrest under the Governor's Warrant are that: (1) the person has not been charged with a crime in the other state, or (2) he is not the person being sought. If the fugitive chooses not to try to obtain a writ of habeas corpus, or if he tries and fails, he is turned over to the agents from the other state.

If a person who commits a crime in North Carolina flees to another state and is found there, essentially the same procedure takes place. A North Carolina fugitive may be extradited from another state if he committed any crime in this state, a felony or misdemeanor, but the State of North Carolina will pay the expenses of extradition only if the crime is a felony. The county would have to pay for a misdemeanor, and some other states are reluctant to extradite for minor crimes.

Once the fugitive is arrested in the other state, the North Carolina district attorney is notified and must put together the documents required by the North Carolina Governor's office for requesting extradition (assuming that the fugitive does not waive extradition). These documents include copies of the arrest warrant or indictment, a statement that the extradition is not sought to enforce a private claim, certain additional information about the circumstances of the crime, and certifications that the documents are all true copies. The Governor's Extradition Secretary reviews the materials to be sure they comply with the requirements of the other state and then makes a formal request for extradition from that state. Once extradition is granted, the Governor commissions one or more North Carolina officers named by the district attorney to bring back the fugitive.

The procedures for extradition are essentially the same in all the states. All except a few states have passed the Uniform Criminal Extradition Act, which is the law in North Carolina, and the others have statutes similar to the uniform act. There are some differences, however, in the practice in other states. For example, many states will not extradite for misdemeanors. The North Carolina Governor's office has experience with the peculiar requirements of other states and tries to review all documents to be certain they will satisfy the other state.

FUGITIVE FROM NORTH CAROLINA FOUND IN ANOTHER STATE

CRIMES SUBJECT TO EXTRADITION

Any person who is charged with a crime in North Carolina and flees to another state may be extradited to North Carolina to stand trial. (Also subject to extradition are those persons who have been *convicted* in North Carolina and have escaped or broken the conditions of probation or parole). However, G.S. 15A-744 provides that the State of North Carolina shall pay the expenses of extraditing only someone who has been charged with a felony. Thus a fugitive charged with a misdemeanor may be extradited but the costs of that procedure — the greatest expense is sending an agent to bring the fugitive back — must be paid by the county where the crime was committed. For that reason extradition should never be initiated against someone charged with a misdemeanor unless there is some assurance the county commissioners will pay the costs.

The National Association of Extradition Officials recommends the policies set out below on extradition for certain offenses. The law allows extradition for each of the offenses mentioned, but the Governor's office agrees with the recommended policies and expects all law enforcement officers and district attorneys to follow them.

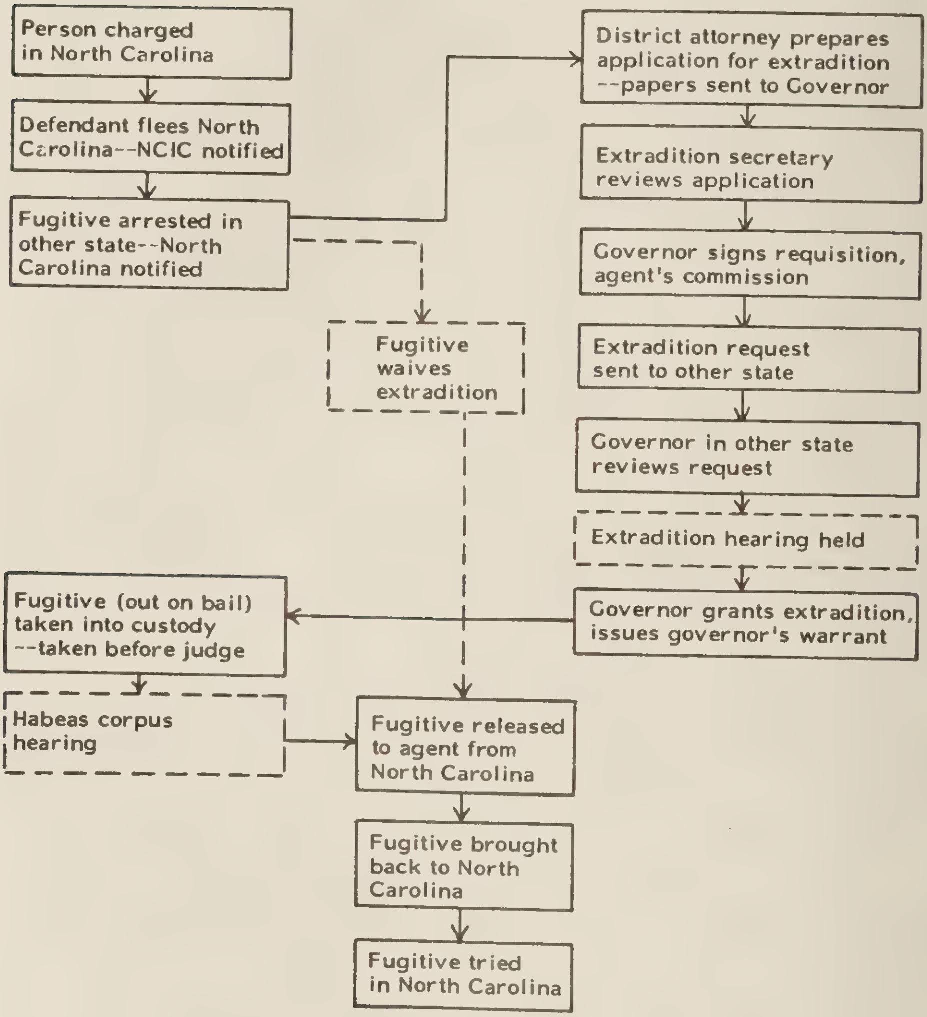
Nonsupport — For abandonment and nonsupport, bastardy, and all similar offenses, action should first be taken under Chapter 52A of the General Statutes, the Uniform Reciprocal Enforcement of Support Act (URESA). Only if that procedure has been unsuccessful should extradition be requested. If the URESA procedure has not been used, the extradition request should include an affidavit from the district attorney or the appropriate law enforcement officer explaining in detail why URESA was not used.

Child custody — Extradition will be granted for violations of G.S. 14-320.1 (transporting child out of state to violate custody order) only if the request is accompanied by an affidavit establishing that violence was used or some other unusual circumstance exists to make it appropriate to treat this as a criminal case.

Worthless checks — Extradition should not be sought for violations of G.S. 14-107, writing worthless checks, unless the check or aggregate checks total more than $100 or the defendant is a chronic violator. These limitations do *not* apply if the charge under G.S. 14-107 is for writing a check on a nonexistent account or on a closed account. Nor is there any limit on extradition for forgery and similar offenses.

Removing mortgaged property — Only in exceptional circumstances should extradition be sought for violations of G.S. 14-114 (fraudulent disposal of personal property on which there is a security interest), G.S. 14-115 (secreting property to hinder enforcement of lien or security interest), or similar statutes. The amount of money involved in such a case does not alter the policy. Generally these problems should be handled as civil matters. This is especially true if the defendant has made regular payments on the merchandise and now owes only a small balance. However, if the defendant purchased a vehicle or other merchandise and immediately left North Carolina, making no payments whatsoever, there would seem to be an intent to defraud and extradition may be sought.

WHAT HAPPENS WHEN A FUGITIVE FROM NORTH CAROLINA IS FOUND IN ANOTHER STATE


Person charged in North Carolina
Defendant flees North Carolina--NCIC notified
Fugitive arrested in other state--North Carolina notified
Fugitive waives extradition
District attorney prepares application for extradition --papers sent to Governor
Extradition secretary reviews application
Governor signs requisition, agent's commission
Extradition request sent to other state
Governor in other state reviews request
Extradition hearing held
Governor grants extradition, issues governor's warrant
Fugitive (out on bail) taken into custody --taken before judge
Habeas corpus hearing
Fugitive released to agent from North Carolina
Fugitive brought back to North Carolina
Fugitive tried in North Carolina

Rental property — If a person fails to return rented property, such as an automobile, and the car has been located, there would appear to be no intent to steal and this matter should be handled civilly rather than through extradition. If, however, the property is rented and the person immediately leaves North Carolina for parts unknown, larceny is probably the proper charge and extradition would be appropriate. Generally, extradition should be sought if the facts show an intent to deprive the owner of the property permanently and thus support a charge of larceny, but extradition should not be sought if the facts support only a charge such as G.S. 14-72.2, unauthorized use of conveyance (unless the conveyance is an aircraft, in which case the offense is a felony).

DUTIES OF THE LAW ENFORCEMENT OFFICER

A. *Review the evidence in the case.* When notified that the fugitive has been taken into custody in the other state and refuses to waive extradition, the first thing the officer should do is review the evidence in the case to be certain that extradition is appropriate and that a prosecution might be successful. Review the section of this manual entitled CRIMES SUBJECT TO EXTRADITION. If the crime is appropriate for extradition, consider whether the witnesses need to be interviewed again. Determine whether the witnesses are likely to change their testimony, whether any of them has already received restitution, whether they are willing to testify in court, and whether they can identify the fugitive by photograph or other means. If witnesses or officers have submitted any affidavits in the case, review these and determine whether they support or contradict the other information in the case. Also review all investigative reports.

B. *Obtain a warrant if necessary.* If, for some reason, the fugitive has not yet been charged in an arrest warrant or an indictment, go to a magistrate and state the facts in the case so that an arrest warrant may be issued (unless you know that the district attorney would prefer to submit a bill of indictment). Five copies of the warrant will be needed eventually, so have five copies issued by the magistrate, each one signed separately. If a warrant or indictment has already been issued, which should usually be the case, have a copy available for reference when you talk with the district attorney. If the charging document is a warrant rather than an indictment, it will be necessary also to have an affidavit by the investigating officer or victim stating the basis for issuing the warrant. This affidavit must be sworn to in front of a magistrate or judge and should have the same date as the warrant or an earlier date.

C. *Check the fugitive's record.* Make a check of the fugitive's prior record and have a copy of it with you when you go to talk with the district attorney.

D. *Meet with the district attorney.* Bring to this meeting with the district attorney or assistant district attorney all the information and documents discussed above. Be candid about any problems you foresee with witnesses or with the methods of investigation in the case and any other factor that might affect the outcome of the case. At this meeting the district attorney should decide whether to proceed with extradition. Usually an assistant district attorney will then take responsibility for preparing the proper papers, but he may well ask your assistance. If he does ask for your help, review the section of this manual entitled CHECKLIST OF DOCUMENTS NEEDED FOR EXTRADITION REQUEST.

DUTIES OF THE DISTRICT ATTORNEY

A. *Decide whether extradition should be sought.* After a law enforcement officer has been notified that a fugitive from North Carolina is in custody in another state and refuses to waive extradition, he should come to you with the relevant information (see the section of this manual on DUTIES OF THE LAW ENFORCEMENT OFFICER). You must decide whether extradition should be sought. First, review the section of this manual entitled CRIMES SUBJECT TO EXTRADITION. If you are satisfied that extradition is appropriate for the kind of offense with which the fugitive has been charged, next consider the following factors:

— The seriousness of the offense.
— The evidence available to prove the crime.
— The challenges that might be mounted against the evidence or the methods of investigation.
— The character of the defendant, including prior convictions.
— The probability of the defendant's committing similar crimes in other communities.
— The probable length of time the defendant will be imprisoned if he is returned to North Carolina and convicted, and the effect of that imprisonment on his conduct after he is released.
— The probability that the governor of the other state will grant extradition.
— The cost of having the defendant returned to North Carolina.
— The effect of not extraditing on others in the community who might consider committing similar crimes.

B. *Prepare the proper papers for extradition.* A separate section of this manual lists the documents that must be submitted to the Extradition Secretary in the Governor's office. An assistant district attorney or administrative assistant may prepare those documents, and a law enforcement officer may assist. The application for requisition may be signed by the district attorney or an assistant. If for some reason the fugitive has not yet been charged in North Carolina in an arrest warrant or indictment, the first step to take is to have such process issued. Although an arrest warrant is sufficient, usually the proceedings in the other state go faster if an indictment is used. For that reason an indictment should be sought unless it is too inconvenient to do so at the time. If an arrest warrant is used, it must be accompanied by an affidavit stating the grounds for charging the defendant. (Although some states consider the standard North Carolina arrest warrant alleging the elements of the offense and the date it was committed to be a sufficient affidavit by itself, most states require something more — something similar to the affidavit used to establish probable cause for a search warrant. To avoid delays, such an affidavit should be included whenever the charging document is a warrant rather than an indictment.) Almost always the affidavit will be completed by the investigating officer or victim. To avoid any question in the other state, the affidavit should have the same date as the warrant or an earlier date.

C. *Select the agents to go to the other state.* The application for requisition is to include the names of the agents to go to the other state to bring back the fugitive. The district attorney should attempt to have the investigating officers or other officers familiar with the case named as agents. It is permissible to name an individual as an agent and include the option of that person's naming someone else, such as "Sheriff Fred Taylor of Ashe County and/or his agent." Some individual's name must always be included. Agents are expected to be ready at any time to travel to the other state when extradition has been granted by the other state or when a hearing is to be held there. The state does not pay travel expenses for a hearing unless the fugitive is returned on that trip.

DUTIES OF THE CLERK OF COURT

The clerk of court has only a limited role in bringing a fugitive back to North Carolina. When the district attorney makes his request for extradition to the Governor of North Carolina (who will in turn make the same request to the governor of the state where the fugitive is now located), the district attorney will have to include various documents, including a copy of the arrest warrant or indictment. Each document must be certified by the official who issued it or by the keeper of the original, the clerk of court. Also, the clerk must certify that the various other officials who certify the documents — the district attorney, magistrate, or judge — are indeed the officials they claim to be. In turn, a judge must certify that the clerk is indeed that official. A summary of the documents and certifications needed for the extradition request is included in the section of this manual entitled CHECKLIST OF DOCUMENTS NEEDED FOR EXTRADITION REQUEST. Otherwise, the clerk has no duties in connection with extradition of a North Carolina fugitive from another state.

DUTIES OF THE AGENT SENT TO BRING THE FUGITIVE BACK

When the district attorney applies to the Governor of North Carolina to seek the extradition of a fugitive who is in another state, he will name the law enforcement officers to be designated the Governor's agents for bringing the fugitive back. An officer who has been designated an agent should not go to the other state until he has been notified that the governor of that state has approved extradition and the authorities there are ready to hand over the fugitive. Also, when more than one agent is to make the trip, the North Carolina Extradition Secretary should be notified before they leave. Expenses will not be paid for any trip made before that notification (a possible exception, though, is when the officer has to attend a hearing before extradition is ordered).

Your commission as an agent of the Governor of North Carolina will be sent to the other state with the Governor's request for extradition and will be waiting for you there. When you return the fugitive to North Carolina to the sheriff of the county where he is to be tried, the sheriff should complete the part of the commission form indicating that he has received the prisoner. You must complete the return portion of the commission and submit it to the Governor's office. If for some reason the fugitive could not be brought back, that fact must be stated on the return portion of the commission and an explanation given.

If the fugitive decided to waive extradition, the officer who brought the fugitive back must send a copy of that waiver to the Governor's office.

In the back of this manual is a copy of the form used for reimbursement of expenses.

CHECKLIST OF DOCUMENTS NEEDED FOR EXTRADITION REQUEST

Listed below are all the documents that might be needed when a request for extradition is sent to the Governor's Extradition Secretary. Usually an assistant district attorney is responsible for gathering the documents, though in some districts he may have substantial assistance from an administrative assistant, law enforcement officer, or someone else. The list states when a document must be certified or signed by a particular person. Whoever gathers the documents should collect *five* complete sets, *four* to go to the Extradition Secretary and *one* to be retained in the district attorney's files.

Arrest warrant — Copies of the arrest warrant are needed if the fugitive has not yet been indicted. If he has been indicted, the arrest warrant is not needed; copies of the indictment will be used instead. The warrant or indictment should be reviewed to see that it properly charges the offense and cites the statute violated. Use of an indictment simplifies the process. An order for arrest (capias) is *not* sufficient by itself.

Affidavits supporting warrant — When the charging document is an arrest warrant, it must be supported by an affidavit. The most likely person to write the affidavit will be the investigating officer or victim. The affidavit must state enough facts to establish probable cause for the issuance of the warrant and, to avoid questions in the other state of the authority of the official to issue the warrant, it must be sworn to in front of a magistrate or judge rather than a clerk. To show that the affidavit was the basis for issuing the warrant, it must have the same date as the warrant or an earlier date. An affidavit is clearly not necessary when the charging document is an indictment, though a few other states prefer to have an affidavit then also.

Certification of documents — If a warrant and affidavit are submitted, they must be accompanied by a certification of the magistrate or judge who issued the warrant or took the affidavit. A clerk of court may certify copies of documents when the clerk is the keeper of the original. Each copy must be certified.

Certifications of office — Whenever a judge or magistrate certifies a document, the clerk of court must certify that person's official character. Then a district court or superior court judge must certify the official character of the clerk. And in turn the clerk must certify the official character of the judge who has certified the clerk.

The indictment — If the fugutive has been indicted, that document should be submitted instead of an arrest warrant. The district attorney should review the indictment to be certain it properly charges the offense and that it has been signed by the foreman. He should also check to see that it cites the statute violated. The authenticity of each copy must be certified by the clerk of court, and the official character of the clerk certified by the judge and the official character of the judge certified by the clerk.

Application for requisition — This form, included in the back of this manual, must be completed in full. Note that the form includes the following information:

- The full name of the fugitive, properly spelled.
- A statement that in the district attorney's opinion the ends of public justice require that the fugitive be brought to North Carolina for trial.
- A statement that the district attorney believes that he has sufficient information to convict the fugitive.
- The names and addresses of the agents who are to go to the other state and bring the fugitive back to North Carolina and a statement that the persons recommended as agents are proper persons and have no private interest in the arrest or conviction of the fugitive.
- A statement whether there has been any former application for requisition of the same person for the same transaction, including the date of such request, and a statement of the reason for the present request if there has been a prior one.
- If the fugitive is under arrest in the other state, a statement that he is under arrest, the nature of the proceedings, the place (with complete address) where he is in custody, if known. If the fugitive is out on bail, the date of his hearing should be stated. If the fugitive's home or business address is known, that should also be stated. The source of this information should be given.

- A statement that the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatsoever, and that if the requisition is granted, the criminal proceeding will not be used for any such purposes.
- A statement of the crime charged and the approximate time, date, places, and circumstances of its occurrence. This statement should include a citation to the statute violated.
- A statement that the person was in North Carolina at the time the crime was committed and has since fled. If, instead, while in another state the person committed an act that intentionally resulted in the crime in North Carolina, that fact must be stated.
- If the crime did not occur recently, an explanation for the delay in making application.

The requisition form provides blanks for all this information or notes the need to include the information.

Certification of district attorney — Again, the clerk must certify the official character of the district attorney submitting the application, and in turn the clerk must be certified by a judge who must then be certified by the clerk. Note that one such certification of official character per official is all that is required, no matter how many documents that official may have signed.

Special affidavits — In any case involving fraud, false pretense, embezzlement, or forgery, there must also be an affidavit of the principal complaining witness or informer that the application is made in good faith, for the sole purpose of criminal punishment, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt or for any other private purpose, either directly or indirectly. If such an affidavit is not included, a good explanation for its absence must be given.

Photograph of the fugitive — Although a photograph is not required, it can be of substantial assistance in identification and should be included whenever possible. The photograph should be accompanied by an affidavit to the effect that the person shown is the person charged with the crime.

Fingerprints of the fugitive — Fingerprints are not required either, but it is highly desirable that they be provided for identification when available.

The statute — Copies of the statute the fugitive is charged with violating should be included.

WHEN THE FUGITIVE IS A PERSON WHO HAS ESCAPED FROM CUSTODY

Extradition procedures are slightly different when the fugitive from North Carolina is a person who has already been convicted in this state and has escaped from custody or has left the state in violation of parole or probation conditions. A separate form, included at the back of this manual, is used for requisition in these cases. The application is to be made by the district attorney or the sheriff if the person was in jail awaiting transfer to the Department of Correction or if he was out of jail pending appeal. If the person escaped from the custody of the Department of Correction, the application is to be made by the Secretary of Correction or a properly designated official of the Department. For a fugitive who has left the state in violation of conditions of probation, the application may be made by the district attorney of the district where the person was serving probation (or might be prepared for the district attorney's signature by the Division of Probation and Parole). If the person was on parole, the request may be made by the district attorney or the Parole Commission. The application for requisition is to be accompanied by the following documents:

- The indictment (or the arrest warrant, if the person was tried on a warrant).

- The judgment of conviction and sentence upon which the person was being held at the time of escape.
- An affidavit of the officer from whose custody the person escaped, showing that an escape occurred and the circumstances of it.
- The record of escape, which includes the transcript and fingerprints.

Five copies of each document should be prepared, with *four* to be sent to the Governor's Extradition Secretary and *one* to be retained by the official who made the application. The clerk of court who holds the original must certify to the authenticity of the indictment (or warrant) and the judgment of conviction and sentence. The clerk must also certify the official character of the person who made the affidavit of the fugitive's escape. The official character of the clerk must be certified by a judge and in turn the official character of the judge must be certified by the clerk.

EXTRADITION OF MILITARY PERSONNEL

If an application for requisition is made for someone who is on active duty with the Air Force, Army, Marine Corps, or Navy, the application must be accompanied by an agreement by the appropriate authorities that:

- The officer in charge of the fugitive will be informed of the outcome of any trial; and
- If the military authorities desire his return, the fugitive will, upon acquittal or completion of his sentence, be returned to the military authorities at the place where he was taken into custody or given transportation to the nearest receiving ship, station, or barracks at the expense of the authority seeking requisition.

If the crime is a felony and the requisition is made through the Governor's office, this agreement will be prepared by the Governor's office and the State will pay the expenses. If the crime is a misdemeanor, so that the expenses of extradition are to be borne by the county, then the district attorney or other official making the application for requisition must prepare and execute the agreement. The agreement may be in the form of a letter to the Secretary of the appropriate branch of the service, setting out the required promises. An example of such an agreement is shown on page 735.

AGREEMENT BETWEEN GOVERNOR OR DISTRICT ATTORNEY AND THE ARMED FORCES

____

date

TO WHOM IT MAY CONCERN:

In consideration of the delivery of ____

(name of fugitive, grade, service number, and branch

________________________ to ________________________ at ________________________, for trial

of armed forces) *(county)* *(city and state)*

upon the charge of ____

(list charge or charges)

____,

I hereby agree, pursuant to the authority vested in me as ______________________________

(Governor or District

________________________, that the commanding officer in charge of the ____________________

Attorney) *(branch of service,*

____,

location of base or station, city and state)

and the Secretary of the ____ will be informed of the

(branch of service)

outcome of the trial and that said ______________________________________ will be returned to

(name of fugitive)

the ____________________________________ authorities at the place of delivery named above or

(name of branch of service)

to such other place as may be deisgnated by the ____

(name of branch of service)

or issued transportation to the nearest receiving ____

(ship, station, or base)

without expense to the United States or to the person delivered, immediately upon the completion of the trial if the person is acquitted or immediately upon satisfying the sentence of the court if he is convicted and a sentence imposed, or upon other disposition of his case, provided that the ____ authorities shall then desire

(name of branch of service)

his return.

____

(signature and typed name of Governor or District Attorney)

OTHER SPECIAL CASES

Fugitives out of the United States — In cases of international extradition the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it to the Secretary of State in Washington.

Fugitives in United States possessions — If the fugitive is in a United States territorial possession, the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it directly to the governor of the possession.

Fugitives in the District of Columbia — If the fugitive is in the District of Columbia, the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it to the Chief Judge of the Superior Court of the District of Columbia. The District of Columbia has several special requirements for extradition; one is that identification of the fugitive must be made by photograph or other description or by sending a witness who can identify the fugitive.

Renewal of application — When an application must be renewed — for example, where the fugitive could not be found in the state from which requisition was first sought — new or recertified copies of the papers required for extradition must be furnished.

FUGITIVE FROM ANOTHER STATE FOUND IN NORTH CAROLINA

DUTIES OF ARRESTING OFFICER

Before an Arrest is Made

A. *Determine whether the person is a fugitive.* The first thing the officer needs to know is whether the suspect has been charged with a crime in another state (by warrant or indictment) or has escaped from imprisonment there (following a conviction) or violated probation or parole by leaving that state. Most often an officer determines that someone is a fugitive by receiving an NCIC message on the PIN terminal. Less often the officer may receive the information by telephone or letter or telegram from an officer in the other state. The PIN message by itself is sufficient to obtain a North Carolina arrest warrant for the fugitive, but the information should be verified by phone or otherwise if possible. As mentioned below, a copy of the other state's warrant or indictment should be obtained as soon as possible and attached to the North Carolina warrant.

B. *Determine whether to arrest with or without a North Carolina warrant.* If the fugitive has been formally charged with a crime in the other state *and* the crime is punishable in that state by death or imprisonment for more than one year, you may arrest him without a North Carolina warrant. Otherwise, an arrest may not be made until a North Carolina magistrate has issued a warrant. It is always preferable to obtain a warrant first if there is time.

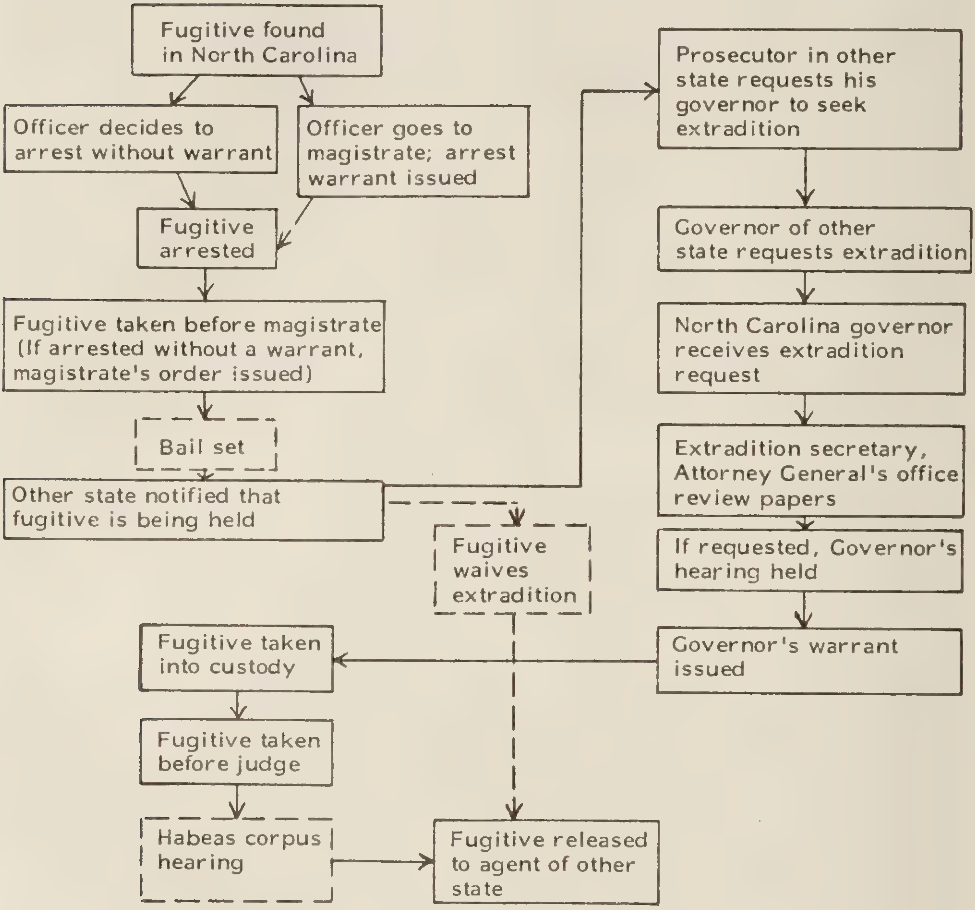
If the Arrest Is to Be Made Without a Warrant, Follow These Steps

C. *Arrest the fugitive.* Follow the same procedure you use when arresting someone for a North Carolina crime. Inform the fugitive why he has been arrested.

D. *Take the fugitive to a magistrate.* This requirement is the same as when you arrest someone for a North Carolina crime.

E. *Tell the magistrate the reason for making the arrest.* State the reason you believe the person has been charged with a crime in another state. If your reason is a PIN message or a letter or telegram, give that to the magistrate to be attached to the FUGITIVE AFFIDAVIT. All that the magistrate is to determine is whether the person has been formally charged in the other state; he does not determine whether there is probable cause to believe the fugitive actually committed the crime. In this case, since you arrested without a warrant, the magistrate must also determine that the crime is punishable by death or imprisonment for more than one year.

WHAT HAPPENS WHEN A FUGITIVE FROM ANOTHER STATE IS FOUND IN NORTH CAROLINA


Fugitive found in North Carolina
Officer decides to arrest without warrant
Officer goes to magistrate; arrest warrant issued
Fugitive arrested
Fugitive taken before magistrate (If arrested without a warrant, magistrate's order issued)
Bail set
Other state notified that fugitive is being held
Prosecutor in other state requests his governor to seek extradition
Governor of other state requests extradition
North Carolina governor receives extradition request
Extradition secretary, Attorney General's office review papers
If requested, Governor's hearing held
Governor's warrant issued
Fugitive waives extradition
Fugitive taken into custody
Fugitive taken before judge
Habeas corpus hearing
Fugitive released to agent of other state

F. *Take the fugitive to jail or release on bail as ordered by the magistrate.* Unless the crime is punishable by death or life imprisonment, the magistrate may release the fugitive on bail just as if he was charged with a North Carolina crime.

G. *Request a copy of the warrant or indictment from the other state.* If this has not already been done, request your contact in the other state to send a copy of the arrest warrant or indictment charging the fugitive with the crime there. When this is obtained, it should be attached to the Magistrate's Order.

If a Warrant Is to Be Obtained Before Making the Arrest, Follow These Steps Instead

C. *Go to the magistrate and complete an affidavit for an arrest warrant.* The FUGITIVE AFFIDAVIT contains instructions on what information is needed. Either you or the magistrate may fill out the form, but you must be certain it accurately reflects your information and you must sign as the affiant.

D. *Tell the magistrate your reasons for arresting the fugitive.* If you have a PIN message, letter, telegram, or other written document showing that the fugitive has been charged with a crime in another state or has escaped from imprisonment there, show that document to the magistrate and help complete the affidavit. All that the magistrate is to determine is whether the fugitive has been charged with a crime in the other state or whether he has escaped from imprisonment or violated probation or parole. The magistrate is not trying to determine whether there was probable cause for the other state to make the charge. In this case it is not necessary to show what punishment the other state places on the crime.

E. *Once the warrant is issued, arrest the fugitive.* The warrant is executed the same as if the person were charged with a North Carolina crime. Inform the fugitive of the reason for his arrest.

F. *Take the fugitive to a magistrate.* This is the same procedure you use when arresting someone with a warrant for a North Carolina crime. The magistrate is to decide whether to allow bail, except when the crime is punishable by death or life imprisonment.

G. *Take the fugitive to jail or release on bail as ordered by the magistrate.* The procedure is the same as when you arrest someone for a North Carolina crime.

H. *Request a copy of the warrant or indictment from the other state.* If this has not already been done, request your contact in the other state to send a copy of the arrest warrant or indictment charging the fugitive with the crime there. When this is obtained, it should be attached to the arrest warrant issued in North Carolina.

If the Fugitive Has Not Yet Been Charged in the Other State

The extradition statutes also allow you to arrest someone who has committed a crime in another state even if he has not been formally charged there. This should occur very infrequently. Most likely it will happen when someone commits a crime in a neighboring state and immediately flees to North Carolina and you are contacted before a judicial official has been found in that other state to issue the warrant. Before making the arrest you need to go to a magistrate and obtain a warrant for arrest. You may use a standard North Carolina arrest warrant form for this purpose, modifying it to allege the name of the crime in the other state (without giving all the elements) and to allege the statute of the other state. Because the other state has not yet issued a warrant, you must show the magistrate *probable cause* to believe the fugitive committed the crime in the other state, just as if you were asking to have a warrant issued for a crime committed in North Carolina. Your probable cause will be the information you have received from the officers in the other state linking the person with the crime there. Once the arrest warrant is issued, proceed just as if it were a warrant charging a North Carolina crime. You should request the officers from the other state to send a copy of the warrant issued there when the defendant is charged in that state. When you receive it, that copy should be attached to the North Carolina arrest warrant.

DUTIES OF MAGISTRATE

If the Officer Comes to You Before Arresting the Fugitive

A. *Determine whether there are grounds for an arrest.* Place the officer under oath and ask what his reasons are for making an arrest. The three grounds that justify an arrest are: (1) the person has been charged with a crime in another state and has fled; (2) the person has been convicted of a crime in another state and has escaped from imprisonment there; or (3) the person has been convicted of a crime in another state and has violated the conditions of his probation or parole by fleeing. The officer's information must be reliable; usually it will consist of a PIN message, but sometimes it may be a letter or telegram or phone call from an officer in the other state, or even a copy of the warrant or indictment from the other state. You are *not* to determine whether there is probable cause to believe the person committed the crime — only whether he has been charged in the other state or has escaped. You must also determine that this is the person wanted by the other state.

B. *Complete the affidavit and arrest warrant.* It is necessary to complete both the FUGITIVE AFFIDAVIT and the WARRANT FOR ARREST FOR FUGITIVE and be certain that they are attached. Follow the usual procedure on number of copies to be completed, sending the original to the clerk's office. Attach to the original the PIN message or any other document used to establish that the person is a fugitive. Remind the officer to obtain a copy of the arrest warrant or indictment in the other state as soon as possible and have it attached to the original copy of the warrant in the clerk's office.

If the Officer Brings in the Fugitive After Arresting Him Without a Warrant

A. *Determine whether the officer had adequate grounds for the arrest.* Place the officer under oath and ask him his reasons for making the arrest. An officer may make an arrest without a warrant only when the person has been charged with a crime in another state *and* that crime is punishable by death or by imprisonment for more than one year. The person might have been charged in the other state by the issuance of an arrest warrant there, by an indictment, or by information filed by a prosecutor in that state. All you are to determine is whether the person has been charged in the other state, *not* whether there was probable cause for the charge. The officer's information that the person has been charged must be reliable; usually it will be a PIN message, but sometimes it may be a letter or telegram or telephone call from an officer in the other state. Sometimes the officer may even have a copy of the warrant or indictment from the other state. If the officer's information is a PIN message, ask him whether he has phoned the other state to verify that the charge is still outstanding and they wish to extradite. It is not essential that the officer make this verification — the PIN message is sufficient justification for arresting the fugitive — but it is a highly recommended practice. Of course you must also determine that the person arrested is the person charged in the other state.

B. *Complete a magistrate's order.* Complete the FUGITIVE AFFIDAVIT and the MAGISTRATE'S ORDER FOR FUGITIVE. Follow the usual procedure on the number of copies to be completed, with the original going to the clerk's office. Attach to the original the PIN message or other written document used to establish that the person is a fugitive. Remind the officer to obtain a copy of the other state's warrant or indictment as soon as possible and have it attached to the original copy of the magistrate's order in the clerk's office.

C. *Inform the fugitive of the charges.* Follow the same procedure you follow in any other case, informing the person of the charge against him, his right to communicate with counsel and friends, and whether he is entitled to bail. Also point out to him the information about his rights on the reverse side of the magistrate's order form. You need not read all that information on the form to him, but at least tell him that he may write the Governor's office to request a hearing before the Governor grants extradition. The request must be in writing and must state the person's reasons for challenging his extradition.

D. *Determine whether to allow bail.* G.S. 15A-736 allows a fugitive to be given bail unless the offense with which he is charged in the other state is punishable by death or life imprisonment. Apparently the only form of pretrial release that may be used is a bail bond with sureties. The bail bond schedule given the magistrate by the senior resident superior court judge should include instructions on what bond to set for fugitives. Sometimes the same amount is required as for a similar North Carolina crime and sometimes that amount is doubled or otherwise multiplied. If bail is not allowed, or if the defendant cannot meet the bail, he should be committed to the county jail.

E. *Order the fugitive to appear in district court.* Whether the fugitive is released on bond or cannot make bond or is ineligible, the release or commitment order should direct that he appear before a district court judge at the earliest possible time. Although the statute does not require an immediate district court appearance for the fugitive who is released on bond, this procedure will give the district judge an early opportunity to review the fugitive's bond, explain the extradition process, and appoint counsel if necessary. In many cases a fugitive will waive formal extradition once he is told about the process and has had an opportunity to talk to a lawyer. If the chief district judge for your district would prefer not to deal with the fugitive at this point, your release is on the condition that the fugitive return for a district court appearance at a specific time within 30 days or that he surrender when a Governor's Warrant is issued. If the Governor's Warrant has not been issued by the time of that first district court appearance, the district judge can continue the case for additional 30-day periods.

If the Officer Arrested the Fugitive on the Basis of a Warrant and Is Now Bringing Him Before You

A. *Inform the fugitive of the charges against him.* The procedure is the same as if the person were charged with a North Carolina crime; he should be informed of the charge against him, the right to communicate with counsel and friends, and whether he is entitled to bail. Also point out to him the information about his rights on the reverse side of the arrest warrant form. You need not read all the information on the form to the fugitive, but be sure to tell him that he may request a hearing before the Governor grants extradition. The request to the Governor's office must be in writing and must state the reasons for challenging his extradition.

B. *Determine whether to allow bail.* G.S. 15A-736 allows a fugitive to be given bail unless the offense with which he is charged in the other state is punishable by death or life imprisonment. Apparently the only form of pretrial release that may be used is bail bond with sureties. The bail bond schedule given the magistrate by the senior resident superior court judge should include instructions on what bond to set for fugitives. Sometimes the same amount is required as for a similar North Carolina crime and sometimes the amount is doubled or otherwise multiplied. If bail is not allowed, or if the defendant cannot meet the bail, he should be committed to the county jail.

C. *Order the fugitive to appear in district court.* Whether the fugitive is released on bond or cannot make bond or is ineligible, the release or commitment order should direct that he appear before a district court judge at the earliest possible time. Although the statute does not require an immediate district court appearance for the fugitive who is released on bond, this procedure will give the district judge an early opportunity to review the fugitive's bond, explain the extradition process, and appoint counsel if necessary. In many cases a fugitive will waive formal extradition once he is told about the process and has had an opportunity to talk to a lawyer. If the chief district judge for your district would prefer not to deal with the fugitive at this point, your release is on the condition that the fugitive return for a district court appearance at a specific time within 30 days or that he surrender when a Governor's Warrant is issued. If the Governor's Warrant has not been issued by the time of that first district court appearance, the district judge can continue the case for additional 30-day periods.

If the Fugitive Has Been Arrested on a Governor's Warrant

A. *Inform the fugitive of the charges against him.* Inform the fugitive of what crime he has been charged with in the other state (which he was already told when he was first arrested in North Carolina) and that the Governor of North Carolina has issued a warrant for him to be taken into custody and returned to the state from which he fled. Also inform the fugitive of his right to communicate with counsel and friends. Usually bail is not given at this stage, but it may be granted if there is a strong likelihood that the defendant will return. Before releasing a fugitive on bail at this point, the magistrate should check with a judge.

B. *Commit the fugitive to jail.* Commit the fugitive to jail to await his appearance before a district court judge, unless he has been released on bail.

C. *Order the fugitive returned to district court at the earliest possible date.* The order of commitment or release order should specify the time and date that the fugitive is to be returned to appear before a district court judge. That should be the earliest time possible. At that time he will be informed of his right to apply for habeas corpus.

When the Fugitive Has Not Yet Been Charged with a Crime in the Other State

The extradition statutes also allow a fugitive to be arrested in North Carolina even though he has not yet been formally charged in the other state. This should occur rarely. Most likely it will happen when the person commits a crime in a neighboring state and flees to North Carolina immediately; then law enforcement officers in North Carolina are requested to arrest him before officers in the other state have been able to find a judicial official to issue an arrest warrant there. Before a North Carolina official can make an arrest in this situation, he must obtain an arrest warrant. The procedure you follow in issuing such a warrant is the same as when the officer wants to charge someone with a North Carolina crime. That is, the officer must be placed under oath and must state facts from which you can independently determine that there is probable cause to believe the person committed the crime in another state. You cannot just accept the word of the officers from the other state that the person committed the crime; you must be told the reasons for reaching that conclusion. (This is different from any other situation involving a fugitive in which all you need to establish is that the person has been charged in the other state, and you are not allowed to inquire as to the probable cause for that charge.) If you determine that there is probable cause, complete an arrest warrant. You can use the standard arrest warrant form but will need to modify it to indicate that the crime is one committed against the law of another state. Instead of spelling out the elements of the offense, you will be able only to state the name of the crime in the other state. Use the name of the crime given by the officers from that state, which may be different from the name used in North Carolina (for example, "second degree robbery"). After the warrant is issued, the case proceeds like any other involving a fugitive.

DUTIES OF THE CLERK OF COURT

When the Fugitive Is First Arrested

A. *Assign a docket number and set a district court hearing.* When the fugitive is arrested, he will be taken to a magistrate like anyone else arrested in North Carolina and will either be committed to jail or given pretrial release. In either case, the magistrate should have scheduled the person to appear in district court as soon as possible. (Although a fugitive released on bail need not be immediately scheduled for a district court appearance — he could simply be released on bond on the condition that he return at the end of 30 days or whenever a Governor's Warrant is issued — it is recommended to the magistrate that the fugitive be set for a district court appearance at the next session. An early appearance gives the judge an opportunity to explain the extradition process and to determine whether the fugitive needs an attorney, which may well result in an early waiver of the formal extradition procedures.) When the fugitive papers are received from the magistrate, the clerk should assign a docket number and set the case for the *first possible district court session.*

If the Fugitive Waives Extradition in District Court, Take These Steps

B. *Accept the waiver and see that the file is complete* While he is in district court, the fugitive may decide to waive extradition. Either the judge or clerk may take that waiver (not a magistrate); a form is provided in this manual. Whoever accepts the waiver should explain the fugitive's rights to him. The clerk is responsible for seeing that the papers are handled correctly. One copy of the waiver goes in the case file, one copy must be sent to the Governor's office, and one copy goes to the jail with the fugitive (to be given to the officer from the other state when he takes custody). Generally the clerk is to see that copies of all correspondence involving the fugitive are kept in the case file. The sheriff is responsible for notifying the officers in the other state that the fugitive is ready to be returned.

If the Fugitive Refuses to Waive Extradition These Steps Should be Followed Instead

B. *Assign an attorney and set a new court date.* If the fugitive does not waive extradition during his first appearance in district court, the clerk should determine indigency and assign an attorney to represent him. Although the statutes do not require appointment of counsel until later in the process, matters can be expedited if the fugitive has a lawyer. The attorney should be mailed a copy of the appointment, the refusal form, the warrant, and a notice of the next court date. Most likely, after the first appearance in district court the judge will have continued the case for 30 days. The defendant will be ordered to return at that time to see whether a Governor's Warrant has been issued by the Governor of North Carolina to have him returned to the other state. If the Governor's Warrant is issued before then, a fugitive who is out on bail may be taken back into custody and taken immediately before a district court judge. If no Governor's Warrant is issued and the fugitive returns as scheduled in 30 days, the case can be continued and another appearance scheduled later. The statute allows the judge to continue the fugitive's bond or commitment for 60 additional days if the Governor's Warrant has not been issued by the end of the first 30-day period. Usually judges continue the case for two additional 30-day periods rather than one 60-day period. The judge will decide whether the fugitive is to be given bond during this time; the clerk's responsibility is to record the information on the commitment paper or release order. Sometimes the judge will simply release the fugitive after 60 days — not waiting the full 90 days — if the other state has not shown any urgency in carrying out formal extradition. If the judge releases the fugitive because no Governor's Warrant has been issued, the clerk closes the case as a dismissal.

C. *Prepare copies of Governor's Warrant, have defendant served, and set court appearance.* When the Governor's Extradition Secretary issues a Governor's Warrant, the original and one copy are sent to the clerk for the sheriff. The clerk should notify the sheriff that the warrant has been received and should make another copy for the fugitive, giving the Governor's Warrant the same docket number as the fugitive warrant used for the original arrest. In addition to the fugitive's copy, the original Governor's Warrant and one other copy are sent to the jail to be signed by the officers from the other state when they come. If the fugitive is not still in custody, the Governor's Warrant is given to an officer to bring him back into custody. The fugitive should be scheduled for the next session of district court. In district court the judge will tell the fugitive that he may apply for habeas corpus, will see that he gets a lawyer if he does not already have one, and will give him a certain amount of time (though still in custody) to decide whether to apply for habeas. The case is then continued for the period set by the district judge. If the fugitive does not apply for habeas corpus by the set time, the district judge orders him turned over to the agents from the other state. If the fugitive does apply for habeas corpus, the docket file is given to the superior court clerks and the case becomes a pending case in superior court to be set for hearing by the district attorney.

D. *Place the original Governor's Warrant in the file and return the copy to the Governor's office.* Once the fugitive is turned over to the agents from the other state — either with or without a habeas corpus hearing in superior court — the original Governor's Warrant is returned to the Governor's office and one copy placed in the court record.

DUTIES OF THE DISTRICT ATTORNEY

When the Fugitive Is First Arrested

When first arrested, the fugitive may be given bond by a magistrate unless the crime is one punishable by death or life imprisonment. Whether the defendant is held or released on bond, the magistrate should schedule him for the next session of district court. (If the fugitive is released on bail, the immediate appearance in district court is not required by the statute — the magistrate could schedule the district court appearance 30 days later — but an immediate appearance will usually expedite matters.) At the district court appearance the judge should inform the fugitive of the charge against him, see that he has a copy of the arrest warrant or magistrate's order, review the bail, and see whether it is necessary to appoint an attorney. The fugitive may waive extradition and be turned over to an agent from the other state, or he may be continued on bonded release or in commitment for up to 30 days (from the time of the initial arrest in North Carolina) to await issuance of a Governor's Warrant.

When the Fugitive Appears in District Court at the End of 30 Days

If the recommended procedure has been followed, the fugitive will have already appeared before a district judge once, when first arrested, although it is possible that he may have been released by a magistrate for 30 days without having seen a judge. In either case, the only purpose of this district court appearance is to determine whether the Governor of North Carolina has issued a Governor's Warrant ordering the fugitive's return to the other state. Before the hearing, the district attorney should determine whether the Governor's Warrant has been issued. If so, proceed as indicated below. If not, the fugitive may be held or released on bond for another 60 days to await issuance of the Governor's Warrant. Judges usually continue the case for 30 days at a time. It is recommended that before he asks for another 30-day commitment, the district attorney try to determine whether the other state is diligently pursuing extradition.

When a Governor's Warrant Is Issued

When a Governor's Warrant is issued, the fugitive is to be taken into custody — he may already be in custody if he was not given bail or could not make bail — and brought before a district court judge. The judge is to inform the fugitive of the other state's demand for his surrender, the crime he has been charged with, that he is entitled to counsel, and that he has a reasonable time, set by the judge, within which to apply for a writ of habeas corpus. The fugitive may *not* be turned over to the agent of the other state until this appearance has been held.

When the Fugitive Applies for the Writ of Habeas Corpus

The district attorney is to be notified if the fugitive applies for habeas corpus; the district attorney will represent the State of North Carolina at that hearing. As discussed in the section of this manual entitled SOME LEGAL ISSUES IN EXTRADITION, the issues that may be raised at the habeas corpus hearing are limited to the following:

Whether the demand for extradition has been made in the proper form. G.S. 15A-723 requires the demand for extradition to include a copy of the indictment, information, or warrant, plus supporting affidavits, used to charge the defendant in the other state. If the fugitive is an escapee, the other state must send a copy of the judgment of conviction or the sentence imposed with a statement that the person has escaped or broken the terms of his bail, probation, or parole. The indictment, information, or warrant and affidavit must substantially charge the person with a crime in the other state and must be authenticated by the governor of that state. Minor defects in the wording of the charge from the other state do not invalidate a charge, nor is there any particular form required for the authentication by the governor.

The identity of the fugitive. The defendant has the burden of showing that he is not the fugitive being sought. Identification can be assisted by photographs or fingerprints accompanying the extradition papers. Sometimes it may be necessary to bring an identifying witness from the other state. A determination that the defendant is not the fugitive does not prevent a subsequent extradition proceeding against the same person for a similar charge.

Whether the person is a fugitive from the other state. The recital in the Governor's Warrant that the defendant is a fugitive from the other state creates a presumption that he is, placing the burden on the defendant to show otherwise. If the charge is one that required his presence in the other state, he may show that he was not there when the crime was committed. The defendant's reason for leaving the other state is irrelevant. The demand from the other state may omit a statement that the defendant was present at the time the crime was committed, if the nature of the crime is such that his presence is implicit in the commission.

Whether the defendant has been charged with a substantial crime. The defendant may show, by introduction of statutes, that his acts do not amount to a crime in the other state.

The Governor's Warrant is presumed valid and the burden is on the defendant to disprove the allegations. Unless related to one of the issues above, it is not relevant to consider the defendant's guilt or innocence, his alibi, the other state's motive in extraditing, the expiration of the statute of limitations, or any constitutional matter such as whether the defendant is likely to receive a fair trial. Nor are the prison conditions of the other state relevant, though there is some authority that the defendant should be allowed to show great likelihood of being lynched or being subjected to cruel and unusual punishment in the other state.

A judgment denying habeas corpus is a final judgment of the superior court for which the defendant may seek certiorari to the Court of Appeals.

If the Fugitive Is Also Charged with a Crime in North Carolina

G.S. 15A-739 allows the Governor of North Carolina to delay extradition if the person being sought by the other state has been charged with a crime in North Carolina. The Governor's Extradition Secretary needs to be notified that a North Carolina charge is pending before she issues the Governor's Warrant.

DUTIES OF THE DISTRICT COURT JUDGE

When the Fugitive Is First Arrested

Normally a district court judge will have no involvement in the initial arrest of a fugitive. The judge could be called upon to issue an arrest warrant just as a magistrate would, but that should happen rarely.

First Appearance Before a District Court Judge

The statute requiring a first appearance before a district court judge, G.S. 15A-601, refers to crimes "in the original jurisdiction of the superior court." Because the fugitive is charged with a crime in another state, it is probably not necessary under that statute to hold a first appearance, but it is recommended that magistrates schedule all fugitives, whether committed or released on bail, to appear at the next session of district court. This procedure can expedite matters considerably. At the first appearance, the judge can inform the fugitive of the charge against him, see that he has a copy of the arrest warrant or magistrate's order, and review the bail set by the magistrate. The fugitive may waive extradition at this appearance (see the separate section on waiver below).

At the first appearance the judge should also tell the fugitive that he may apply in writing for a Governor's hearing before a Governor's Warrant is issued. The request must state the grounds for opposing extradition. The only issues that will be considered are: (1) whether the person has been charged in the other state, (2) whether the papers are in proper form, (3) whether the person demanded is the person charged, and (4) whether the accused is a fugitive. A Governor's hearing may be granted or denied in the Governor's discretion.

If the fugitive is granted bail but cannot make it or if he is denied bail, he should be committed to jail to be returned to district court on a specific date within 30 days of his arrest. At that time there will be a determination whether a Governor's Warrant has been issued. If he is released on bond after the first appearance, his release should be conditioned on a return to district court on a specific date within 30 days to determine whether the Governor's Warrant has been issued, or to return whenever the warrant is issued if it is sooner than 30 days.

Usually the first appearance would be used to determine whether counsel should be appointed. Although the extradition statutes, in particular G.S. 15A-730, provide for the fugitive to be notified of the right to counsel *after* the Governor's Warrant has been issued (when the fugitive is taken back into custody and taken before a judge to be informed of his right to apply for habeas corpus), it is recommended that the need for counsel be determined at the first appearance. Doing so often helps in informing the defendant of the extradition process and helping him decide whether to waive formal extradition.

When the Fugitive Returns to Court After 30 Days

Whether the fugitive is out on bond or has been committed to the jail, he is to return to district court within 30 days of his arrest in North Carolina. This appearance is used to determine whether a Governor's Warrant has been issued by the Governor of North Carolina ordering that the fugitive be returned to the other state. If the warrant has been issued, proceed as indicated in the next section. If the Governor's Warrant has not been issued, the fugitive may be continued on bond or committed to jail for up to 60 additional days to await issuance of the Governor's Warrant. The usual practice is to continue the case for 30 days at a time. It is recommended that before an additional 30-day custody is imposed, the district attorney or a law enforcement officer be required to determine whether the other state is diligently pursuing extradition. Of course the fugitive may use this opportunity to waive extradition and return voluntarily to the other state (see below).

When a Governor's Warrant Has Been Issued

Once a Governor's Warrant is issued, G.S. 15A-730 requires that the fugitive be brought before a judge before being delivered to the agent of the other state. Apparently (see discussion on page 726) the fugitive is not entitled to bail after the Governor's Warrant is issued, but in some cases the likelihood of the fugitive returning may be so strong that bail would be appropriate. The magistrate is advised to confer with a judge when he thinks he has such a case. At the district court appearance following the arrest on a Governor's Warrant, the judge is to inform the fugitive of the demand made for his return by the other state, the charge against him in that state, that he has the right to demand and procure counsel, and that he may challenge the legality of his arrest by applying for a writ of habeas corpus. If the fugitive wants counsel and is indigent, the judge should appoint counsel if that has not already been done. The statute also requires that the fugitive be given a reasonable time within which to apply for habeas corpus. The time limit is to be fixed by the district court judge. The judge should order the fugitive held in the county jail (or other place of confinement) until the time expires for applying for habeas corpus, at which time he is to be turned over to the agent for the other state. It is not appropriate to allow bail at this stage of the process.

If the Fugitive Wishes to Waive Extradition

At any time after he has been arrested, the fugitive may waive extradition and be delivered to an agent from the other state. G.S. 15A-746 allows the waiver to be made before a judge or a clerk of court. The waiver must be in writing; a form is provided in this manual. Before the form is signed, the fugitive must be told that he may refuse to waive extradition and require the other state to make a formal request for extradition and that if a Governor's Warrant is issued, he may apply for a writ of habeas corpus. When the waiver is signed, one copy is to be forwarded to the Governor's Extradition Secretary and one copy is to be provided to the agent from the other state. The judge should order the fugitive released to that agent. If the agent is not present, the fugitive should be ordered held in jail until he arrives.

DUTIES OF THE SUPERIOR COURT JUDGE

When the Fugitive Is First Arrested

The superior court judge should have no direct involvement in the extradition case unless the fugitive applies for a writ of habeas corpus. The senior resident superior court judge is to issue a bail policy to be used by the magistrates in his district, and that policy should indicate what bond is to be required of a fugitive. The extradition statute on bail, G.S. 15A-736, allows bail to be given unless the offense is punishable by death or life imprisonment. The only form of release allowed by the statute is a secured appearance bond. Once a Governor's Warrant is issued, usually bail will not be allowed, though it could be given (see discussion on pages 721 and 726).

When the Fugitive Applies for a Writ of Habeas Corpus

After the Governor's Warrant is issued, a fugitive may apply for a writ of habeas corpus. As discussed in greater detail in the section of this manual entitled SOME LEGAL ISSUES IN EXTRADITION, the issues that may be raised at the habeas corpus hearing are limited to the following:

Whether the demand for extradition has been made in the proper form. G.S. 15A-723 requires the demand for extradition to include a copy of the indictment, information, or warrant, with supporting affidavits, used to charge the defendant in the other state. If the fugitive is an escapee, the other state must send a copy of the judgment of conviction or the sentence imposed with a statement that the person has escaped or broken the terms of his bail, probation, or parole. The indictment, information, or warrant and supporting affidavit must substantially charge the person with a crime in the other state and must be authenticated by the governor of that state. Minor defects in the wording of the charge from the other state do not invalidate a charge, nor is there any particular form required for the authentication by the Governor.

The identity of the fugitive. The defendant has the burden of showing that he is not the fugitive being sought. Identification can be assisted by photographs or fingerprints accompanying the extradition papers. Sometimes it may be necessary to bring an identifying witness from the other state. A determination that the defendant is not the fugitive does not prevent a subsequent extradition proceeding against the same person for a similar charge.

Whether the person is a fugitive from the other state. The recital in the Governor's Warrant that the defendant is a fugitive from the other state creates a presumption that he is, placing the burden on the defendant to show otherwise. If the charge is one that required his presence in the other state, he may show that he was not there when the crime was committed. The defendant's reason for leaving the other state is irrelevant. The demand from the other state may omit a statement that the defendant was present at the time the crime was committed, if the nature of the crime is such that his presence is implicit in the commission.

Whether the defendant has been charged with a substantial crime. The defendant may show, by introduction of statutes, that his acts do not amount to a crime in the other state.

The Governor's Warrant is presumed valid and the burden is on the defendant to disprove the allegations. Unless related to one of the issues above, it is not relevant to consider the defendant's guilt or innocence, his alibi, the other state's motive in extraditing, the expiration of the statute of limitations, or any constitutional matter such as whether the defendant is likely to receive a fair trial. Nor are the prison conditions of the other state relevant, though there is some authority that the defendant should be allowed to show great likelihood of being lynched or being subjected to cruel and unusual punishment in the other state.

A judgment denying habeas corpus is a final judgment of the superior court for which the defendant may seek certiorari to the Court of Appeals.

If the Fugitive Wishes to Waive Extradition

At any time after he has been arrested, the fugitive may waive extradition and be delivered to an agent from the other state. G.S. 15A-746 allows the waiver to be made before a judge or a clerk of court. The waiver must be in writing; a form is provided in this manual. Before the form is signed, the fugitive must be told that he may refuse to waive extradition and require the other state to make a formal request for extradition, and that if a Governor's Warrant is issued he may apply for a writ of habeas corpus. When the waiver is signed, one copy is to be forwarded to the Governor's Extradition Secretary and one copy is to be provided to the agent from the other state. The judge should order the fugitive released to that agent. If the agent is not present, the fugitive should be ordered held in jail until he arrives.

[Editor's Note. — At this point, the Extradition Manual quotes Article 37 (§§ 15A-721 to 15A-750) of G.S. Chapter 15A. The Article has been omitted here as it can be found in Part I of Volume 1C of the General Statutes.]

SOME LEGAL ISSUES IN EXTRADITION

1. *Is the fugitive entitled to a hearing before a Governor's Warrant can be issued?*

The general rule is that he is not. *Ex Parte Wammack*, 482 S.W.2d 859 (Tex. Crim. App. 1972); *Scheinfain v. Aldredge*, 12 S.E.2d 868 (Ga. 1941); *Application of Dugger*, 497 P.2d 413 (Ariz. Ct. App. 1972); *Horne v. Wilson*, 306 F. Supp. 753 (D. Tenn. 1970).

2. *What issues may the Governor consider in deciding whether extradition is proper in a given case?*

The cases generally hold that the Governor must determine that the accused is a fugitive, that he is substantially charged with a crime in the demanding state, and that the papers from the demanding state are in order. *Reynolds v. Conway*, 288 A.2d 77 (Conn. 1971); *Norton v. State*, 470 P.2d 413 (Idaho 1970); *Moncrief v. Anderson*, 342 F.2d 902 (D.C. Cir. 1964); *In re Maldonado*, 304 N.E.2d 419 (Mass. 1973). What the Governor considers beyond these factors is generally not reviewable by the courts (*e.g., Kujala v. Headley*, 225 N.W.2d 25, in which the Governor's investigation into purposes of prosecution in demanding state was not reviewable). Thus, while asylum courts cannot consider such defenses as denial of speedy trial, *Wise v. State*, 251 N.W.2d 373 (Neb. 1977); threatened mistreatment in the demanding state, *Murray v. Burns*, 405 P.2d 309 (Hawaii, 1965); procedural errors in the accused's trial, *Commonwealth ex rel. Colclough v. Aytch*, 323 A.2d 359 (Pa. Super. 1974); accused's competence to stand trial, *Kellems v. Buchignani*, 518 S.W.2d 788 (Ky. 1974); technical validity of indictment, *Samples v. Cronin*, 536 P.2d 306 (Colo. 1976); *Martinez v. Sheriff of Clark County*, 527 P.2d 1200 (Nev. 1974), etc., the Governor can consider such factors and if he declines to issue a Governor's Warrant, the courts cannot force him to do so. *South Dakota v. Brown*, 144 Cal. Rptr. 758 (1978).

3. *Is a fugitive entitled to be released on bail before the Governor's Warrant is issued?*

G.S. 15A-736 says that the magistrate or judge "may admit the person arrested to bail by bond" unless the person is charged with a crime punishable by death or life imprisonment under the laws of the state in which it was committed. The statute mentions only release by bail with sufficient sureties.

4. *Does a person held for extradition have a right to be released on bail after a Governor's Warrant has been issued?*

The majority rule is that the Uniform Extradition Law *does not* grant a right to bail to a person held for extradition after a Governor's Warrant is issued. *In re Iverson*, 376 A.2d 23 (Vt. 1977); *Matter of Lucas*, 343 A.2d 855 (N.J. Super. 1975), *aff'd* 346 A.2d 624 (N.J. Super. 1975); *Balasco v. State*, 289 So.2d 666 (Ala. App. 1974); *State ex rel. Howard v. St. Joseph Superior Court*, 316 N.E.2d 356 (Ind. 1974). Most courts have also held that judges have no common law or inherent power to grant release on bail in such circumstances (see cases cited above). *But see Carrio v. Watson*, 370 A.2d 950 (Conn. 1976), which held that releasing a fugitive on bail was proper, even after a Governor's Warrant had been served on the fugitive; the opinion was based on the court's common law power to allow bail "in all cases"; and *Ex Parte Quinn*, 549 S.W.2d 198 (Tex. Crim. App. 1977), granting bail based on state statute giving right to bail in "any habeas corpus proceeding" except capital cases.

5. *Is a fugitive entitled to counsel at a habeas corpus hearing to contest the legality of an extradition proceeding?*

Yes, pursuant to G.S. 15A-730, any accused is entitled to have counsel present at such hearings. Most courts have held that counsel in such cases is required solely by statute and is not constitutionally required under the Sixth Amendment. *Hystad v. Rhay*, 533 P.2d 409 (Wash. App. 1975); *Wertheimer v. State*, 201 N.W.2d 383 (Minn. 1972); *Roberts v. Hocker*, 456 P.2d 425 (Nev. 1969). Courts have, nevertheless, held that counsel must be appointed for indigents contesting extradition proceedings at habeas corpus proceedings. *People v. Braziel*, 169 N.W.2d 513 (Mich. App. 1969); *Ex Parte Turner*, 410 S.W.2d 639 (Tex. Crim. App. 1967). In North Carolina, G.S. 7A-451(a)(5) entitles an indigent held for extradition to appointed counsel. Appointed counsel is not required at an initial arraignment on a fugitive warrant or at a hearing before the Governor. *Rutledge v. Preadmore*, 176 N.W.2d 417 (Mich. App. 1970).

6. *On what grounds may a fugitive attack a Governor's Warrant in a habeas corpus proceeding?*

The general rule in a habeas corpus proceeding in which a person is held for extradition is that the court may consider only: (1) whether the accused is the person being demanded by the demanding state; (2) whether the accused was present in the demanding state when the crime took place (except for proceedings arising under G.S. 15A-726); (3) whether the accused is charged with a criminal offense; and (4) whether the paperwork in the case is in order. *Michigan v. Doran*, 439 U.S. 282 (1978); *State ex rel. DeGideo v. Talbot*, 250 N.W.2d 169 (Minn. 1977); *People ex rel. Kubala v. Woods*, 284 N.E.2d 286 (Ill. 1972);

U.S. ex rel. Tyler v. Henderson, 453 F.2d 790 (5th Cir. 1971). The defendant's evidence must be conclusive; mere conflicting testimony as to an accused's absence from the demanding state at the time of trial will not support the accused's release from custody at a habeas corpus proceeding. *People ex rel. Garner v. Clutts*, 170 N.E.2d 538 (Ill. 1970); *State ex rel. Zack v. Kriss*, 74 A.2d 25 (Md. 1952).

7. *Must an indictment, information, or warrant from the demanding state be accompanied by affidavits or other documents showing the basis for the probable cause to arrest the fugitive?*

Courts generally hold that an indictment carries with it a sufficient finding of probable cause so that an asylum state may not look behind the document to see for itself whether probable cause exists. *U.S. ex rel. Davis v. Behagen*, 436 F.2d 596 (2d Cir. 1970); *People v. Jackson*, 502 P.2d 1106 (Colo. 1972).

If the documents sent by the demanding state do not contain an indictment, they must show that a detached and neutral judicial official in the demanding state has found probable cause to exist in the case; if the Governor in the asylum state decides to issue a Governor's Warrant, the courts in the asylum state may not review the documents to see whether they contain a showing of probable cause. *Michigan v. Doran*, 439 U.S. 282 (1978).

8. *What is the standard of proof required for a fugitive who is attacking a Governor's Warrant in a habeas corpus proceeding? Does the state have the burden of producing evidence if a defendant introduces evidence contesting his status as a fugitive?*

A Governor's Warrant creates a presumption of regularity in an extradition proceeding, and a fugitive who wishes to attack the warrant must show by clear and convincing evidence that the warrant is invalid. *People ex rel. Harris v. Warden*, 345 N.Y.S.2d 29 (App. Div. 1973); *Stolz v. Miller*, 543 P.2d 513 (Colo. 1975); *McCollough v. Darr*, 548 P.2d 1245 (Kan. 1976). Other cases have formulated the standard of proof as requiring "conclusive" evidence, *People ex rel. Pirone v. Police Comm'r*, 225 N.Y.S.2d 257 (App. Div. 1962); or as requiring "clear and satisfactory" evidence, *State ex rel. Rhodes v. Omodt*, 218 N.W.2d 461 (Minn. 1974).

States differ on whether the prosecution must present evidence to rebut an alleged fugitive's evidence. In *Rhodes*, the court held that the state must present "minimal" evidence rebutting an alleged fugitive's evidence that he was not in the demanding state at the time of the crime; in *Stolz*, the court held that a statement by an alleged fugitive does not necessarily rebut the presumption of regularity created by the Governor's Warrant.

DETAINERS

Sometimes a person who is wanted for prosecution is already in prison. A prosecutor may lodge a "detainer" against the prisoner by notifying the prison authorities that the person has charges pending against him and thus prevent release of the prisoner without notice to the prosecutor. Virtually all the states, including North Carolina, have joined an Interstate Agreement on Detainers that establishes procedures for resolving pending charges against a prisoner early in his detention in another state. This section of the Extradition Manual gives a brief explanation of the detainer procedure.

The Interstate Agreement on Detainers is found in G.S. 15A-761. The Agreement allows both the prisoner and the prosecutor to request early resolution of charges outstanding against the prisoner. The prison officials who have custody of the prisoner are required to notify him of any detainers lodged against him. He may then request final disposition of the charges. When the prisoner makes such a request, the prison officials notify the prosecutor in the other state and offer him the opportunity to take custody of the prisoner. The prosecutor must try the case within 180 days of the delivery of the prisoner. A delay in the trial deadline may be granted for good cause by a judge if either the prisoner or his lawyer is present.

If detainers have been lodged for other charges from the same state, the prosecutors responsible for the other charges are also notified of the prisoner's request for final disposition. His request is considered a request for disposition of all charges pending in that state. Failure to prosecute any of the charges pending against the prisoner in that state within the 180-day period, or the extended deadline, means dismissal of the charges with prejudice.

The prosecutor also has the power to force an early trial. When a prosecutor has a charge against a prisoner in another state, the prosecutor may request temporary custody for trial. The governor of the other state can refuse to grant that request, but if he agrees, or if he does not object within 30 days, the prisoner is turned over for prosecution. The trial must be held within 120 days of receiving custody of the prisoner — again with delays possible for good cause — or the charges must be dismissed with prejudice. Each prosecutor in the state who has a detainer on the prisoner is notified that he is being returned for prosecution so that they may make their own requests for temporary custody.

After trial, the prisoner is returned to the state where he was serving his sentence. Once he completes his sentence in the state where he was originally in prison, he is given back to the other state to serve the sentence imposed there.

An Administrator for the Interstate Agreement on Detainers is employed in the Department of Corrections. The Administrator can provide additional information on detainers and the forms to be used in the procedures described above.

FORMS

STATE OF NORTH CAROLINA

County of ______________

The State of North Carolina Vs.

____
Defendant

In the General Court of Justice

______________ Court Division

FUGITIVE AFFIDAVIT
(To be used with ARREST WARRANT or
MAGISTRATE'S ORDER FOR FUGITIVE)

____, being duly sworn states that he has received:

☐ a NCIC-PIN message which is attached;

☐ a copy of a (warrant) (indictment) from _________________ County,
State of ______________________________, which is attached;

☐ A telephone call from ____________________________________, who is
____________________________ in __________________________ County,
(name position)
State of ___________________;

stating that the defendant named above has been (charged with) (convicted of) the crime of
____ in the State of ______________________
_____________, which crime was committed on or about the __________ day of __________,
19__.

Disregard language next to boxes which are not checked.

☐ The crime with which the defendant has been charged in that other state is punishable there by death or by imprisonment for a term exceeding one year.
(Note: The requirement that the crime be punishable by death or more than one year's imprisonment applies only if the defendant has been arrested without a warrant and the officer is now seeking a Magistrate's Order.)

The affiant further states that he has reasonable grounds to believe that:

☐ the defendant named above has fled from justice in that other state;
(Note: Use this choice if the person has not yet been convicted.)

☐ on or about the ______ day of ______________, 19__, the defendant named above did escape from confinement imposed as a result of his conviction of the crime named above in the criminal courts of the county and state named above;

☐ on or about the _______ day of _______________, 19__, the defendant named above did break the terms of his (bail) (probation) (parole) imposed as a result of his conviction of the crime named above in the criminal courts of the county and state named above;

and that the affiant has reasonable grounds to believe that the defendant named above is now in the State of North Carolina and is subject to arrest under the provisions of G.S. 15A-733 and/or G.S. 15A-734.

____
Affiant

Sworn and subscribed before me this the
_____ day of ________________, 19___

____
Judge/Magistrate

(This form prepared by the Institute of Government, The University of North Carolina at Chapel Hill, September 1979)

EXTRADITION

STATE OF NORTH CAROLINA

County of ______________

The State of North Carolina Vs.

File # ______________________

File # ______________________

In the General Court of Justice

______________ Court Division

WARRANT FOR ARREST

FOR FUGITIVE

____
Defendant

____
Age Race Sex Occupation

____
Address

To any officer with authority and territorial jurisdiction to execute a warrant for arrest for the offense charged below:

Based on the attached affidavit, the UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE that:

Disregard language next to boxes that are not checked.

☐ On or about the _____ day of ____________, 19___, the crime of ________________ ________________ was committed in the State of ____________________, and that the defendant named above was charged in the criminal courts of ________ County, State of ___ ____________, with the commission of that crime, and that since that time the defendant has fled from justice in that state and is now in the State of North Carolina and subject to arrest under the provisions of G.S. 15A-733.

☐ On or about the _____ day of ____________, 19___, the defendant named above

☐ escaped from confinement
☐ broke the terms of his (bail) (probation) (parole)

imposed as the result of his conviction of the crime of ______________________ ___________ in the criminal courts of ___________ County, State of ____________, and that the defendant is now in the State of North Carolina and is subject to arrest under the provisions of G.S. 15A-733.

YOU ARE DIRECTED TO ARREST THE DEFENDANT NAMED ABOVE AND BRING HIM WITHOUT UNNECESSARY DELAY BEFORE A JUDICIAL OFFICIAL TO ANSWER THE CHARGES SET OUT ABOVE.

Issued this _____ day of ___________, 19___, upon information furnished under oath by the complainant or complainants named below.

Complainant(s) Name, Address or Department

____
Assistant Deputy Clerk of Superior Court
Magistrate

SEE IMPORTANT INFORMATION ON THE OTHER SIDE OF THIS FORM

File Number

THE STATE
Vs.

WARRANT FOR ARREST FOR FUGITIVE

Issued _____ day of _____, 19__

WITNESSES

For State:

For Defendant:

This form prepared by the Institute
of Government, The University of
North Carolina at Chapel Hill
September 1979

If this warrant for arrest if not executed within 180 days, it must be returned to the clerk of the county in which it was issued with the reason for the failure of execution noted thereon. The officer must state all the steps taken by his department in attempting to execute the warrant and any information obtained about the location of the defendant.

OFFICER'S RETURN

I certify that this warrant was received on the ______ day of ____________, 19___.

☐ It was executed on the _______ day of ______________, 19___ by arresting the defendant and bringing him before ____.

☐ It was not executed for the following reason: ____

____

____

____

This ______ day of _______________, 19___.

Department	County or City	Law Enforcement Officer

IMPORTANT INFORMATION FOR THE PERSON ARRESTED

You have been arrested as a fugitive from justice in another state, as stated on the other side of this form. If that other state requests your return, the Governor of North Carolina will consider whether you should be extradited. You may challenge the legal sufficiency of the other state's request for your extradition. To do so, you must submit a written request to the Governor of North Carolina for an extradition hearing. The Governor will decide whether a hearing should be held. If the Governor decides that you should be returned to the other state, either with or without a hearing, he will issue a Governor's Warrant authorizing officers in this state to place you in the custody of agents from that other state. However, the law of North Carolina provides that you have the following rights in this matter:

- You may not be handed over to the agent of the other state until you have appeared in front of a North Carolina judge. That judge will tell you what crime you have been charged with and that the other state has demanded your surrender.
- You are entitled to have an attorney represent you.
- If you cannot afford to hire your own attorney, you are entitled to have an attorney appointed to represent you.
- You (or your attorney) are entitled to challenge the legality of your arrest. If you wish to challenge the legality of your arrest after the Governor's Warrant has been issued, you will be given a reasonable time to apply for a writ of habeas corpus.

If you wish, you may give up your right to have a Governor's Warrant issued, or you may give up the rights listed above, and you will be handed over immediately to an agent of the other state to take you to that state. But you *do not* have to give up any of these rights and you may not be forced to do so.

EXTRADITION

STATE OF NORTH CAROLINA	File # ____________________
County of ____________	File # ____________________
The State of North Carolina Vs.	In the General Court of Justice
	____________ Court Division

____
Defendant

MAGISTRATE'S ORDER

FOR FUGITIVE

____
Age *Race* *Sex* *Occupation*

____
Address

On the basis of the attached affidavit, the undersigned finds that the defendant named above has been arrested without a warrant and his detention is justified because there is probable cause to believe that on or about the ________ day of ____________________, 19___, the crime of ____________________ was committed in the State of ____________, and that the defendant named above has been charged in the criminal courts of ____________ County, State of ____________________, with the commission of that crime, which is punishable in that state by death or by imprisonment for a term exceeding one year, that the defendant had fled from justice in that state and is subject to arrest under the provisions of G.S. 15A-734.

Issued this ________ day of ____________, 19___, upon information furnished under oath by the arresting officer or officers named below. The undersigned has this day delivered a copy of this order to the defendant.

Name and Department of Arresting Officer(s)

____
Assistant Deputy Clerk of Superior Court
Magistrate

SEE IMPORTANT INFORMATION ON THE OTHER SIDE OF THIS FORM

File Number ____________

THE STATE
Vs.

MAGISTRATE'S ORDER FOR FUGITIVE

Issued ______ day of ____________, 19___

WITNESSES

For State: ____________

For Defendant: ____________

This form prepared by the
Institute of Government
The University of North Carolina
at Chapel Hill
September 1979

IMPORTANT INFORMATION FOR THE PERSON ARRESTED

You have been arrested as a fugitive from justice in another state, as stated on the other side of this form. If that other state requests your return, the Governor of North Carolina will consider whether you should be extradited. You may challenge the legal sufficiency of the other state's request for your extradition. To do so, you must submit a written request to the Governor of North Carolina for an extradition hearing. The Governor will decide whether a hearing should be held. If the Governor decides that you should be returned to the other state, either with or without a hearing, he will issue a Governor's Warrant authorizing officers in this state to place you in the custody of agents from that other state. However, the law of North Carolina provides that you have the following rights of this matter:

- You may not be handed over to the agent of the other state until you have appeared in front of a North Carolina judge. That judge will tell you what crime you have been charged with and that the other state has demanded your surrender.
- You are entitled to have an attorney represent you.
- If you cannot afford to hire your own attorney, you are entitled to have an attorney appointed to represent you.
- You (or your attorney) are entitled to challenge the legality of your arrest. If you wish to challenge the legality of your arrest after the Governor's Warrant has been issued, you will be given a reasonable time to apply for a writ of habeas corpus.

If you wish, you may give up your right to have a Governor's Warrant issued, or you may give up the rights listed above, and you will be handed over immediately to an agent of the other state to take you to that state. But you *do not* have to give up any of these rights and you may not be forced to do so.

STATE OF NORTH CAROLINA)
)
v.) WAIVER OF EXTRADITION
)
______________________) G.S. 15A-746
Defendant

Having been arrested in this state and charged with committing the crime of ____
____
in ______________________ County, State of ______________________,
and understanding that authorities from such state are demanding my return for trial, I do hereby waive the issuance and service of the Governor's Warrant provided for in G.S. 15A-727 and -728, and all other procedures incident to extradition. In open court I consent to return to the demanding state upon the arrival of the authorities from that state, and do hereby waive extradition. Before I signed this waiver, the court informed me of my right to the issuance and service of a warrant of extradition, my right to legal counsel, and of my right to apply for a writ of habeas corpus, as provided in G.S. 15A-730.

____
Defendant's Signature

As (judge) (clerk) of ____________________ Court of ______________ County, a court of record, I certify that the above-named defendant appeared before me this date. I informed him of his legal rights with respect to extradition, and he voluntarily signed the above waiver of extradition in my presence.

This the __________ day of ________________, 19 __.

____
(Judge) (Clerk) of _______ Court

____
Typed Name of Judge or Clerk

STATE OF NORTH CAROLINA

Application for Requisition
(Normal)

TO THE GOVERNOR OF NORTH CAROLINA, THE HONORABLE ______________________________:

I, ____
(name and full address of district attorney)

____,

as (District Attorney) (Assistant District Attorney) for the ______________

Prosecutorial District, ______________________________, North Carolina,

apply for the requisition and return to North Carolina of ____________________

____,
(full name of fugitive)

That defendant stands charged by the accompanying certified copy of the

(warrant) (indictment), now pending in the ______________________ Court of

________________________________ County, with the crime of ___________

____
(state name of crime and give General Statute citation)

____

____.

That crime was committed while the defendant named above was present in that

county on or about the ________ day of ________________, 19 __, but since the commission of the crime he has fled from the jurisdiction of North Carolina to avoid prosecution and is now a fugitive from justice who (is under arrest and held at) (has been arrested and released on bond at) ____________

____
(give complete address)

____

in the State of ______________________________. The information that

the defendant is located in that place comes to me from ____________________

____
(give name, office and address of source)

____.

Application for Requisition, continued

Justice requires that the defendant be brought back to North Carolina for trial. I believe that the facts stated in the (warrant) (indictment) are true and that prosecution of the defendant would result in his conviction for the crime with which he is charged.

I nominate ______________________________

____

(give name, office, address and phone number for agent)

____

____

to be appointed and commissioned by you as the agent of North Carolina to receive the defendant and deliver him to the custody of the Sheriff of ______ ______________________ County. The agent has no private interest in the proposed arrest, nor is this requisition sought to collect a private debt, enforce a civil remedy, or otherwise answer any private end.

Use the following blanks to explain why this application is made if there has been a previous application or if there has been a considerable lapse of time since the commission of the crime. Also use these blanks to explain what the defendant did that caused the crime in North Carolina if he was not in the state at the time the crime occurred but extradition is sought under Section 6 of the Uniform Extradition Act (G.S. 15A-726):

____

____

____

____

____

Respectfully submitted,

____

Sworn to and subscribed to before me, this the _____ day of ____________________, 19 _____

____

(Clerk/ Assistant Clerk/ Deputy Clerk of Superior Court)

____

County and Address

EXTRADITION

STATE OF NORTH CAROLINA

Application for Requisition
(Defendant Already Convicted)

TO THE GOVERNOR OF NORTH CAROLINA, THE HONORABLE ______________________________:

I, ____
(name and full address)

____

the ____,
(office)

apply for the requisition and return to North Carolina of ____________________

____
(full name of fugitive)

who was convicted of the crime of ____

____

in the ____________________ Court of ________________________ County, on the

_______ day of ______________________, 19 ___, as stated in the accompanying copy of the judgment and sentence. Since that conviction the person named

above has fled from North Carolina in violation of __________________________

____
(the crime of escape, probation, parole, bond on appeal)

and (is now under arrest and held at) (has been arrested and released on

bond at) ____
(give complete address)

____

in the State of ________________________________. The information that the

person is located in that place comes to me from ____________________________

____
(give name, office and address of source)

____.

The extradition of the person named above is sought, and the ends of justice require that he be returned, for the purpose of (trial) (hearing) on

the ____ in violation
(crime of escape or revocation of probation or parole)

Application for Requisition, continued

of North Carolina General Statute ____________, and I believe that there is sufficient evidence to (convict the defendant) (prove the defendant's violation) of that charge. The facts supporting this charge are contained in the accompanying (warrant and affidavit) (indictment) (affidavit of the officer from whose custody the defendant escaped) (certificate of parole and revocation of parole) (certificate of conditional release and revocation of conditional release).

I nominate ____

____

(give name, office, address and phone number for agent)

____

to be appointed and commissioned by you as the agent of North Carolina to receive the defendant and deliver him to the custody of the Sheriff of

______________________ County. The agent has no private interest in the proposed arrest, nor is this requisition sought to collect a private debt, enforce a civil remedy, or to otherwise answer any private end.

Use the following blanks to explain why this application is made if there has been a previous application or if there has been a considerable lapse of time since the commission of the crime:

____

____

____

____

____

Respectfully submitted,

____

Sworn to and subscribed to before me, this the ______ day of ____________________, 19 _____

____

(Clerk/ Assistant Clerk/ Deputy Clerk of Superior Court)

____

County and Address

OFFICE OF THE GOVERNOR
Request for Reimbursement of
Expenditures in Returning a Fugitive
to North Carolina

This is to certify that the expenses as shown below are true and accurate and were necessary in returning ______________________________ fugitive(s), to ______________________________ City/County of North Carolina to stand trial on the felony charge(s) of ______________________________

____

Date left North Carolina ____________________ Returned ____________________

City/County Complete — Governor's Office Complete

Subsistence: Overnight

No. days ________ x State Rate x ________ No. Officers $____________________

No Overnight

No. days ________ x State Rate x ________ No. Officers $____________________

Travel:

Mileage (Round Trip)
to ____________________

____________________ ________ miles $____________________

Air Travel Actual Cost
(Attach Receipt) $________ $____________________

Other Expense--Explain in
Detail on Back $________ $____________________

Due City/County $____________________

______________________________ Police Chief/Sheriff

This is to certify that the above named fugitive was returned to North Carolina on felony charge as shown above.

______________________________ District Attor

Instructions:

(1) Use this form for each trip when picking up a fugitive. If more than one fugitive picked up on a single trip, include *all* expenses on this form.
(2) Do not itemize subsistence expenses. Reimbursement is at the set state rates ($45 day for overnight travel, $16.50 for travel not involving an overnight stay), regardless of the actual expenses for room and meals.
(3) Send *three* copies of the form to the Governor's office.
(4) If the district attorney is not available, have the clerk of court sign the certification.
(5) The only receipt that needs to be attached is the receipt for air fare.

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STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 5, 1985

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1985 Annotated Rules of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

Lacy H. Thornburg
Attorney General of North Carolina

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